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VERSIONS: Full volume

The Guardian ad Litem Handbook

Summary of Developments

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The Guardian ad Litem Handbook

Sixth Edition

Brittney A. Busalacchi
Victoria Davis Dávila
Margaret V. Kaiser
Kristin Kerschensteiner
Kate A. Neugent
Eric J. Ryberg
Jeffrey Spitzer-Resnick

David W. Thompson
Samantha S. Wagner



State Bar of Wisconsin PINNACLE
5302 Eastpark Blvd., Madison, WI 53718
<http://www.wisbar.org>

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Summary of Developments

New Developments Reported in the 2024–25 Revision

The sixth edition of *The Guardian ad Litem Handbook* integrates the developments that were reported on separate supplement pages in the years since publication of the fifth edition. It also incorporates recent case-law, statutory, and administrative developments and revises other discussions. The legal developments discussed in, and other updates to, the sixth edition include the following:

The State Bar of Wisconsin's Committee on Professional Ethics issued a formal opinion in 2023 (revised in 2024) concerning the conflicts of interest that might arise out of an attorney's service as a guardian ad litem. *See* §§ 1.9, 3.13.

The Wisconsin Legislature increased the compensation rates for court-appointed private bar attorneys as of July 1, 2023. *See* §§ 1.20, 3.33, 4.122, 6.44.

Citations to various social-sciences references have been updated in chapter 2 (Children: The Human Side), which continues to refine the discussion of child development and the emotional and psychological effects of divorce and domestic abuse on children. In particular, the chapter's former discussion of parental alienation has been significantly revised to provide a broader perspective and updated discussion of parent-child contact problems. *See* §§ 2.31–.40.

The Wisconsin Legislature has enacted legislation that creates a new out-of-home care placement option with a person who is “like-kin.” *See, e.g.*, §§ 2.14, 4.2, 4.39, 4.51.

A new discussion has been added to section 2.41 concerning the role of advocacy counsel in relation to the role of the guardian ad litem in cases involving children.

The Wisconsin Legislature passed an act concerning newborn infant safety devices (“baby boxes”) under the safe-haven law for relinquishing custody of a newborn. *See* § 4.11.

The Wisconsin Legislature has extended for two more years the pilot program in five counties for appointment of counsel through the state public defender’s office for nonpetitioning parents in proceedings for children in need of protection or services (CHIPS). *See* § 4.16.

The Wisconsin Court of Appeals, in a 2023 opinion, examined the voluntariness of parents’ consent to termination of parental rights. *See* § 4.98.

In an opinion published in 2023, the court of appeals discussed whether a parent’s conviction for neglect of a child resulting in death as a party to the crime qualified as a serious felony, establishing a ground for terminating that parent’s parental rights. *See* § 4.99.

The Wisconsin Court of Appeals, in an unpublished opinion issued in 2023, addressed whether a motion for summary judgment in a termination-of-parental-rights (TPR) case was timely filed. *See* § 4.99.

In a 2024 opinion in a TPR case, the Wisconsin Supreme Court addressed whether [Wis. Stat.](#) § 48.23(2)(b)3. required the circuit court to wait at least two days before proceeding to a dispositional hearing after the court determined that a parent’s failure to appear as ordered was “egregious and without clear and justifiable excuse,” and, if so, whether the court lost competency to conduct the TPR dispositional hearing because the court failed to wait two days. *See* § 4.100.

In a 2024 decision, the supreme court reviewed a circuit court order that denied a parent’s postdisposition motion to withdraw a no-contest plea to the termination of that parent’s parental rights, but the majority declined to determine the burden of proof at the dispositional stage of a TPR proceeding. *See* § 4.104.

Section 5.5 now contains an updated discussion about autism spectrum disorder, including information from the American Psychiatric Association’s “Text Revision” in 2022 to the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR)*.

A section in chapter 5 (Adults with Mental Disabilities: The Human Side), which formerly discussed Community Services Systems, has been removed from the chapter because corresponding statutes have been repealed and Wisconsin’s statewide Family Care program has replaced the former county-based systems. *See* §§ 5.53–.56.

Appendix 5B, listing resources for specific disabilities, long-term support services, and governmental programs, has been updated.

The Wisconsin Records Management Committee has created a standard court form to confirm a guardian’s completion of a required guardian training program. *See* §§ 6.14, 6.31.

The Wisconsin Court of Appeals, in 2022, issued an opinion that discussed the requirements for a proposed ward to attend the final hearing on petitions for guardianship and protective placement. *See* §§ 6.21, 7.15.

References have been added in section 6.33 to the applicable standard court forms to use when requesting that a witness appear remotely, e.g., for a guardianship hearing.

Author commentary has been added to section 6.40 about some counties’ practices of waiving the proposed ward’s appearance at a temporary guardianship hearing.

The discussion in chapter 6 (Guardianship: [Wis. Stat.](#) ch. 54 on minor guardianships has been revised to focus on guardianships of a child’s estate. *See* §§ 6.46–.60. (For a discussion of minor guardianships of the person, see chapter 4.)

The Wisconsin Court of Appeals, in an unpublished 2023 opinion, reviewed an order for protective placement under [Wis. Stat.](#) ch. 55, and discussed the possibility of a person meeting both the legal standards for protective placement and the legal standards for a

mental health commitment. *See* § 7.2; *see also* §§ 8.23, 8.33.

The Wisconsin Legislature has added managed-care organizations to the list of entities that can arrange for placement of an individual in a facility under [Wis. Stat.](#) § 51.40(2). *See* § 7.12.

The Wisconsin Court of Appeals, in a 2023 unpublished opinion, discussed whether medical testimony is needed at an initial hearing under [Wis. Stat.](#) ch. 55 or [Wis. Stat.](#) ch. 54. *See* § 7.14.

The Wisconsin Legislature has created a process for the certification of crisis urgent care and observation facilities as placements for treatment of individuals under the Wisconsin Mental Health Act. *See* § 8.1.

Newly added section 8.22 discusses the definition of “mental illness” within the meaning of the Mental Health Act.

The Wisconsin Court of Appeals issued several opinions in 2022, 2023, and 2024 that discussed issues arising in cases involving orders for civil commitment, recommitment, or an extension of a commitment under the Mental Health Act. *See* §§ 8.26, 8.30, 8.32.

The sixth edition also updates forms throughout *The Guardian ad Litem Handbook*.

Finally, the index to the book has been updated to reflect revised section numbers and new content.

Foreword

This one-of-a-kind reference is devoted exclusively to the role of the guardian ad litem. The idea for the book, which originated with author Judy Sperling-Newton and reviewer Kathleen Jeffords, grew out of training seminars presented for guardians ad litem in Dane County. Originally the book was to be a small handbook explaining the role of the guardian ad litem primarily in family and juvenile cases. When John Franz, Dianne Greenley, and Roy Froemming of Disability Rights Wisconsin (formerly the Wisconsin Coalition for Advocacy) joined the project, the scope of the book was expanded to include the role of the guardian ad litem in relation to people with disabilities.

The State Bar of Wisconsin is indebted to the *Handbook*’s current volunteer authors, Brittney Busalacchi, Victoria Davis Dávila, Margaret Kaiser, Kristin Kerschensteiner, Kate Neugent, Eric Ryberg, Jeffrey Spitzer-Resnick, David Thompson, and Samantha Wagner, for their commitment to this project. They have devoted countless hours to writing, rewriting, reviewing, proofing, and reproofing *The Guardian ad Litem Handbook* for this sixth edition. Thanks also go to the State Bar of Wisconsin staff, including attorney editor Hana Miura, production coordinators Christie Chang and Amy Curl, and administrative assistant Stephanie Vosberg.

The result of these combined efforts is not only a book to help lawyers practice law; it is also a statement about the dignity of the individual, regardless of age or disabilities, and it is a book that we believe will make a meaningful difference to those individuals in our society least capable of protecting their own rights.

STATE BAR OF WISCONSIN

About the Authors

Brittney A. Busalacchi is a partner with the Baraboo law firm of Cross Jenks Mercer & Maffei, LLP. She focuses her practice on family law and serves as guardian ad litem in various family cases, CHIPS (children in need of protection or services) cases, and guardianship and protective placement matters. Brittney received her Bachelor of Arts degree in 2009 from Marquette University and her Juris Doctor from the University of Wisconsin Law School in 2013. She is a member of the State Bar of Wisconsin, the State

Bar's Family Law Section, the Collaborative Family Law Council of Wisconsin, and the Legal Association for Women. Brittney also participated in developing the Sauk County Pro Se Family Law Clinic.

Victoria Davis Dávila is a partner at Davis & Pledl in Milwaukee, Wisconsin. She graduated from Marquette University Law School in 2011. She has dedicated her legal career to supporting individuals with disabilities and their families regarding the spectrum of decision-making options, special education law, special needs planning, and obtaining services for high-needs children and civil rights, with a particular focus on children's issues. She has worked in private practice and in the nonprofit realm in special education advocacy. Since 2019, she and her mentor, attorney Rock Pledl, have focused on disability and civil rights and practice throughout Wisconsin on state and federal issues. Her younger brother inspired her to pursue this area of law.

Margaret V. Kaiser is a partner at Willow River Law, LLC, in Hudson, Wisconsin, where she represents the best interests of children and vulnerable adults as a guardian ad litem. She also represents clients in Social Security disability appeals, guardianships, estate planning, and probate matters. Margaret began her legal career at a New Richmond law firm where she worked on civil litigation matters and Social Security disability appeals. She then had a solo practice in Hudson where she began her guardian ad litem work. Margaret attended the University of Wisconsin-Madison for her undergraduate degree in social work, and she graduated from the University of Wisconsin Law School.

Kristin Kerschensteiner is the director of legal and advocacy services at Disability Rights Wisconsin, the state protection and advocacy system for people with disabilities, and has been an attorney there in various capacities for more than 25 years. She is a graduate of the University of Wisconsin, the University of Washington School of Communications, and Seattle University Law School. Before coming to Wisconsin, she practiced disability law in Chicago, Illinois, for many years.

Kate A. Neugent is an associate with the Milwaukee law firm of Burbach & Stansbury S.C. She focuses her practice in family law, serving as a guardian ad litem, advocate counsel, or mediator. Ms. Neugent has an undergraduate degree in social welfare and is a graduate of Marquette University Law School. Before joining Burbach & Stansbury S.C., she was employed with the Legal Aid Society of Milwaukee as a guardian ad litem in the Family Division. She is a member of the Collaborative Family Law Council of Wisconsin, the Association of Family and Conciliation Courts, and the State Bar of Wisconsin's Family Law Section, and she is a past president of the Leander J. Foley Society of Family Lawyers.

Eric J. Ryberg is a shareholder and co-managing partner of the Madison office of Habush, Habush & Rottier, S.C.[®] He received his B.A. from the University of St. Thomas in St. Paul, Minnesota, and his J.D. from the University of Wisconsin Law School. He is a Board-Certified Civil Trial Law Advocate by the National Board of Trial Advocacy. He serves on the board of the State Bar of Wisconsin's Litigation Section, on which he is a past chairperson. He is a past president of the Dane County Bar Association. He is also a member of the Wisconsin Association for Justice and the American Association for Justice. He has represented many children in personal-injury-related matters.

Jeffrey Spitzer-Resnick graduated from Boston College Law School in 1985, cum laude. He is the principal and owner of Systems Change Consulting. For more than 39 years, he has engaged in effective systems change advocacy, initially on behalf of older adults and for the past 29 years on behalf of children with disabilities, including in special education and Section 504 of the Rehabilitation Act. He has done this in nearly every forum and method possible, including individual litigation and class actions, state and federal lobbying, grassroots organizing, consumer and professional training, and producing publications.

David W. Thompson, Ph.D., ABPP, is a forensic and clinical child psychologist in private practice at Clinical Psychology Associates, LLC in Burlington, Wisconsin. Dr. Thompson was formerly the deputy director of the Walworth County Department of Health and Human Services, and he consults frequently with attorneys, courts, and governmental agencies on a number of child-related topics.

Samantha S. Wagner was appointed in September 2024 as the circuit court judge for Branch 4 in Brown County. Before this appointment, she was the lead assistant corporation counsel for Brown County, primarily prosecuting cases in children's court in Brown County. She completed her B.A. degree (with honors) in international relations and with a minor in peace and justice studies at the University of San Diego. She received her J.D. with a concentration in civil litigation and a certificate in health law from Saint Louis University. While at Saint Louis University, she was a lead editor for the *Journal of Health Law and Policy*. She also received a graduate certificate in clinical health care ethics from the Albert Gnaegi Center for Health Care Ethics. She has served on the executive board of the Wisconsin Professional Society on the Abuse of Children since March 2015 and is the current president. Judge

Wagner has conducted many trainings and seminars on the children’s court and how to facilitate a working relationship with a multidisciplinary team for child abuse and neglect matters.

Authors of Previous Editions

Mary Beth Arnett
 Joan N. Alschuler
 Richard J. Auerbach
 Steven A. Bach
 Rachel L.L. Caplan
 Roy W. Froemming
 Thomas R. Glowacki
 Dianne Greenley
 Mitchell Hagopian
 Casey A. Holtz, Ph.D.
 James R. Jansen
 Marlene A. Porter
 Chantelle Ringe
 Judith Sperling-Newton
 Gretchen G. Viney
 Heather A. Wilson

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[*See The Bluebook: A Uniform System of Citation* R. 4.2(a), 15.10, B15.2 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).]

Note About Citation of Electronic Media and Online Sources

“The Bluebook requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source....” *The Bluebook: A Uniform System of Citation* R. 18.2 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015). Because books published in Books UnBound differ in format from their print counterparts, the print versions of State Bar of Wisconsin books should be cited in official filings. *See id.* R. 15.9(c) (“Print versions are authoritative....”).

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Chapter 1

The Guardian ad Litem: An Overview

[Brittney A. Busalacchi](#)

I. Scope of Chapter [§ 1.1]

This chapter gathers in one place the broad considerations that are common to guardian ad litem work in Wisconsin. It looks first at general concepts common to all types of guardian ad litem practice and then moves on to consider ethics and liability concerns, court-appointment variables, acceptance issues and training requirements, payment, and selected challenges inherent in guardian ad litem work. For questions about particular areas of guardian ad litem work, refer to the practice-specific chapters in this handbook.¹

II. General Concepts Common to All Guardian ad Litem Practice [§ 1.2]

A. Guardian ad Litem as Court-Appointed Lawyer [§ 1.3]

The term *guardian ad litem* comes from Latin and means in translation “guardian for the suit or action.” Black’s Law Dictionary (12th ed. 2024) defines guardian ad litem as “[a] guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.” Except in certain limited situations in probate actions, *see* [Wis. Stat.](#) § 879.23(4)(b), (c), guardians ad litem in Wisconsin must be attorneys. [Wis. Stat.](#) § 757.48. Other states may use nonlawyer guardians ad litem but, in Wisconsin, guardians ad litem are lawyers.

A Wisconsin guardian ad litem is a court-appointed lawyer who represents the interests of an individual in the context of a court proceeding. Courts appoint guardians ad litem in children’s court ([Wis. Stat.](#) ch. 48), family court ([Wis. Stat.](#) ch. 767), adult guardianships of the estate and of the person and minor guardianships of the estate ([Wis. Stat.](#) ch. 54), protective services or protective placements ([Wis. Stat.](#) ch. 55), various injunction proceedings ([Wis. Stat.](#) ch. 813), probate cases involving missing or minor heirs or individuals adjudicated incompetent ([Wis. Stat.](#) § 879.23), personal-injury cases when the injured party is a minor or an individual adjudicated incompetent ([Wis. Stat.](#) §§ 807.10(2), 803.01(3)), and other situations within the discretion of the court. Each area has its own procedures, but some concepts run throughout the entire guardian ad litem system. This section explores those concepts.

Words used to describe the guardian ad litem are important. In some Wisconsin counties, courts and lawyers incorrectly refer to the guardian ad litem as “guardian” and to the person whose interest the guardian ad litem represents as “ward.” By using these words, the courts imply an agency relationship between the guardian ad litem and the individual when, in fact, the guardian ad litem does not have an agency relationship with the individual. *See infra* § 1.6. Moreover, in adult guardianships, potential for misunderstanding exists in interchanging the terms, particularly if the guardian ad litem is working diligently to avoid the appointment of a *guardian* for the *proposed ward*. The court system and those working within it should be careful to refer to the guardian ad litem appropriately, not as “guardian,” and to refer to the individual involved not as “ward” but as “the person whose interests are represented by the guardian ad litem.”

B. Guardian ad Litem as “Best Interests” Lawyer [§ 1.4]

Guardians ad litem in Wisconsin are “best interests” lawyers; that is, they represent an individual’s “best interests,” not what the individual directs. The “client” is the individual’s “best interests.” [SCR](#) 20:4.5 and the accompanying supreme court commentary guide the guardian ad litem:

[SCR 20:4.5 Guardians ad litem.](#) A lawyer appointed to act as a guardian ad litem or as an attorney for the best interests of an individual represents, and shall act in, the individual’s best interests, even if doing so is contrary to the individual’s wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct that are consistent with the lawyer’s role in representing the best interests of the individual rather than the individual personally.

Wisconsin Comment: The Model Rules do not contain a counterpart provision. This rule reflects established case law that a guardian in Wisconsin is a lawyer who represents the best interests of an individual, not the individual personally. *See Paige K.B. v. Molepske*, [219 Wis. 2d 418](#), [580 N.W.2d 289](#) (1998); *In re Steveon R.A.*, [196 Wis. 2d 171](#), [537 N.W.2d 142](#) (Ct. App. 1995). Supreme Court Rules, Chapters 35–36, govern eligibility for appointment as guardian ad litem in certain situations.

This rule expressly recognizes that a lawyer who represents the best interests of the individual does not have a client in the traditional sense but must comply with the Rules of Professional Conduct to the extent the rules apply.

The statutes that require appointment of a guardian ad litem also clearly designate the guardian ad litem as a “best interests” lawyer. *See, e.g., Wis. Stat.* §§ 767.407(1)(a) (family court), 48.235(3) (children’s court), 54.40 (adult guardianships and minor guardianships of the estate), 55.10(4)(b) (protective services or placement); *see also Wis. Stat.* § 813.122(3)(b) (invoking *Wis. Stat.* § 48.235 in proceedings for child abuse restraining orders and injunctions).

Note. Attorneys should be aware of the distinction between the Wisconsin approach of the guardian ad litem representing the best interests of the individual and the American Bar Association’s (ABA’s) preference for the guardian ad litem to represent the child individually, as a client. In 2003, the ABA Family Law Section Council approved *Standards of Practice for Lawyers Representing Children in Custody Cases*, which recognized the dichotomy between advocacy counsel and “best interests” counsel and expressed a clear preference for the former. *See* https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/other_documents/as/standards_of_practice_for_lawyers_representing_children.pdf. In 2011, the ABA adopted the *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (2011), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf. The Model Act, in the context of child abuse and neglect cases, requires that children be represented by adversary counsel (with “best interests” advocates as potential additions to the proceedings). On the whole, the ABA does not favor the concept of “best interest” lawyering, but the concept nonetheless remains established in Wisconsin.

C. Guardian ad Litem as Trial Advocate [§ 1.5]

A guardian ad litem is always a trial advocate for the individual’s best interests. *See* statutes cited in section 1.4, *supra*. Case law across all areas of practice confirms that the guardian ad litem is a trial advocate who operates independently. *See, for example, Hollister v. Hollister*, [173 Wis. 2d 413](#), [496 N.W.2d 642](#) (1992), and *Wiederholt v. Fischer*, [169 Wis. 2d 524](#), [485 N.W.2d 442](#) (1992), in the family law context, and *E.H. v. Milwaukee County (In the Interest of T.L.)*, [151 Wis. 2d 725](#), [445 N.W.2d 729](#) (Ct App. 1989), in the context of children’s court. While the actual duties of a guardian ad litem vary depending on type of appointment, the concept of the guardian ad litem as trial advocate remains consistent across case types. For that reason, a guardian ad litem must be a competent trial attorney, able to pursue a civil matter from inception through appeal. Of course, most civil cases do not come to trial, but the guardian ad litem must be prepared to participate fully in the civil court system.

In some situations, the guardian ad litem is not the only trial advocate working on an individual’s behalf. In guardianship cases under *Wis. Stat.* ch. 54 as well as children’s court cases under *Wis. Stat.* ch. 48, the individual may have court-appointed advocacy counsel. (In contrast, in family court cases, the child is not entitled to adversary counsel so the guardian ad litem is the sole attorney acting on the child’s behalf. *See Joshua K. v. Nancy K. (K.)*, [201 Wis. 2d 655](#), [549 N.W.2d 494](#) (Ct. App. 1996).) In the situation in which the individual has adversary counsel, the guardian ad litem must be cautious not to interfere with the activities of that lawyer acting on behalf of the individual. In *E.H.*, 151 Wis. 2d at 736–38, the appellate court concluded that adversary counsel need not defer to the guardian ad litem’s waiver of the ward’s right to contest a children’s court petition. Working with this backdrop, the court in *Jennifer M. v. Mauer (In re Guardianship of Jennifer M.)*, [2010 WI App 8](#), ¶ 12, 323 Wis. 2d 126, [779 N.W.2d 436](#), held that while *Wis. Stat.* § 54.40(4)(a) requires the guardian ad litem to interview the proposed ward, the guardian ad litem must hold the interview in the presence of a represented ward’s adversary counsel. Of course, adversary counsel has the authority to grant permission to the guardian ad litem to meet alone with the individual, *see SCR* 20:4.2, but need not do so. In situations in which the individual has adversary counsel in addition to a guardian ad litem, the guardian ad litem must be cautious not to interfere with the zealous representation of the client’s wishes by adversary counsel. While the guardian ad litem is not relieved of the duty to represent the best interests of the individual, the guardian ad litem cannot take any actions that would be contrary to the representation of the client’s interests by the adversary counsel.

D. Guardian ad Litem Contrasted with General Guardian [§ 1.6]

A guardian ad litem is not a guardian. A guardian ad litem is a trial advocate for the best interests of an individual, appointed in the context of a court proceeding. As such, the guardian ad litem has none of the rights of a general guardian. *See Rohleder v. Wright*, [162 Wis. 580](#), 582, [156 N.W. 955](#) (1916); *Richter v. Estate of Leiby*, [107 Wis. 404](#), 407, [83 N.W. 694](#) (1900). This limitation is specifically recognized in the appointment statutes: *Wis. Stat.* §§ 767.407(4) (family court), 54.40(3) (guardianship and protective services or placement), 48.235(3) (children’s court).

As a practical matter, this limitation means that the guardian ad litem cannot, for example, sign a child’s school permission slip, consent to medical treatment for the individual whose rights the guardian ad litem represents, or access financial accounts. In some

counties, a family court guardian ad litem, by tradition, may exercise rights that come very close to those held only by a legal guardian. For example, in Dane County, by tradition (and anecdotally), family court guardians ad litem may be able to block a parent's access to a child's counseling records. This is an aberration because, by statute, a guardian ad litem cannot exercise powers of a general guardian.

III. Ethics and Liability [§ 1.7]

A. Application of Rules of Professional Conduct [§ 1.8]

Guardians ad litem, as lawyers, are subject to the Rules of Professional Conduct. Of course, application of many rules is straightforward. So, for example, the guardian ad litem must be competent ([SCR 20:1.1](#)) and diligent ([SCR 20:1.3](#)). The guardian ad litem must not talk to an individual represented by counsel without the counsel's consent absent specific authorization by law or court order ([SCR 20:4.2](#)). If a party is unrepresented, the guardian ad litem must follow the mandates of [SCR 20:4.3](#). Generally, the Rules of Professional Conduct apply to the guardian ad litem as they would to any other attorney.

Difficulties in applying the rules often arise in two categories, discussed further below. First, many rules require a person as a client, so applying the rules in a "best interests" context is often challenging and sometimes confusing to attorneys serving as guardian ad litem. Second, the guardian ad litem is often encouraged or expected to move beyond an advocacy role into a witness role, implicating ethics issues.

B. Complications Caused by "Best Interests" as Client [§ 1.9]

Application of the rules may be challenging because a guardian ad litem does not represent an individual but, instead, represents the concept of "best interests." Without a person as a client, some rules are ambiguous or even inapplicable in practice.

Guardians ad litem have their own ethics rule, [SCR 20:4.5](#), cited and quoted above (*see supra* § [1.4](#)). This rule recognizes that the guardian ad litem represents a concept and that certain rules will not apply if an actual person as a client is required.

Sometimes the rules become murky because the "client" is "best interests." For example, [SCR 20:1.2\(a\)](#) requires a lawyer to abide by a client's decisions concerning the objectives of representation, but the guardian ad litem does not have a client who can make decisions. Many rules have as their premise the existence of clients who are either individuals or some form of legal entity that, in turn, has living, breathing humans in positions of responsibility. Adoption of [SCR 20:4.5](#) in 2007 was an attempt to bring clarity to these concerns, although guardians ad litem are still faced with a smattering of court decisions that were decided before [SCR 20:4.5](#).

One way of dealing with the difficult application of the rules is by equating the individual's best interests with the individual personally. So, in *In re Disciplinary Proceedings Against Kinast*, [192 Wis. 2d 36](#), [530 N.W.2d 387](#) (1995), the court held that an attorney for the mother in a family law case inappropriately met with the mother's children absent the consent of the guardian ad litem, who was treated as the children's attorney for purposes of [SCR 20:4.2](#). Because of the holding in *Kinast*, other attorneys involved in a case must not speak with the individual whose interests the guardian ad litem represents without the guardian ad litem's permission.

Conflict-of-interest rules ([SCR 20:1.7](#) and [SCR 20:1.8](#)) are particularly difficult to apply in the context of a "best interests" lawyer. In *La Crosse County Department of Social Services v. Rose K. (In the Interest of Steveon R.A.)*, [196 Wis. 2d 171](#), [537 N.W.2d 142](#) (Ct. App. 1995), the court struggled with application of the conflict rules and finally stated in a footnote: "We conclude that for the purpose of this conflict of interest analysis, a guardian ad litem represents a child." *Id.* at 177 n.2.

Comment. Like the *Kinast* case, *Rose K.* was decided long before enactment of [SCR 20:4.5](#). One wonders whether the result might have been different if decided in light of [SCR 20:4.5](#).

In another conflict-of-interest case, the court held that a guardian ad litem cannot simultaneously represent the best interests of two children in a divorce action in which one child is a child of the marriage and the other child's paternity is disputed. The court concluded that the two children "have patently differing interests" so that separate guardians ad litem should have been appointed. *Riemer v. Riemer*, [85 Wis. 2d 375](#), 380, [270 N.W.2d 93](#) (Ct. App. 1978). This case was distinguished in *Hendrick v. Hendrick (In re Paternity of B.N.H.)*, [2009 WI App 33](#), 316 Wis. 2d 479, [765 N.W.2d 865](#). In *Hendrick*, the circuit court had consolidated two cases, a

divorce case and a paternity case, involving the same parties. The circuit court appointed the same guardian ad litem for the child in the paternity case as had been appointed for that child, and a half-sibling, in the divorce action. The court of appeals distinguished these circumstances from those in *Riemer* because there was never any doubt in the consolidated cases in *Hendrick* that the children had different fathers while, in *Riemer*, the potential existed that the children had a common father. *Hendrick*, [2009 WI App 33](#), ¶¶ 15–16, 316 Wis. 2d 479.

Another conflict-of-interest case involving a guardian ad litem is *Tamara L.P. v. County of Dane (In re Guardianship & Protective Placement of Tamara L.P.)*, [177 Wis. 2d 770](#), [503 N.W.2d 333](#) (Ct. App. 1993). In that case, the court held that a lawyer who had previously served as adversary counsel for an individual in a mental commitment case could not serve as guardian ad litem for that individual in the subsequent guardianship and protective placement proceedings. The court essentially concluded that confidential information gained during the prior representation might be used adversely in the subsequent proceedings because the guardian ad litem might have the responsibility to take a position directly adverse to the individual. Therefore, according to the court’s reasoning, the attorney could not fill both roles. For a recent ethics opinion that cited *Tamara L.P.* and several other cases discussed in this chapter, see State Bar of Wis. Comm. on Pro. Ethics, Formal Op. EF-23-02 (revised Feb. 6, 2024).

Other conflict-of-interest situations may be systemic; that is, the guardian ad litem may hold another position in the county that may create a conflict of interest. For example, a Wisconsin ethics opinion addressed conflicts arising from dual roles as family court commissioner and guardian ad litem. State Bar of Wis. Comm. on Pro. Ethics, Formal Op. E-09-04 (2009). The opinion set a low threshold for what constitutes having sufficiently participated “personally and substantially” in a case so as to give rise to a conflict under [SCR 20:1.12\(a\)](#) should the attorney later be appointed as a guardian ad litem in a related matter. This opinion may also affect part-time district attorneys, court commissioners, mediators, and others who hold various positions in counties and who also serve as court-appointed guardians ad litem.

C. “Trial Advocate” Contrasted with “Witness” [§ 1.10]

Because the guardian ad litem is a trial advocate, the guardian ad litem is not a witness. [SCR 20:3.7](#) confirms that a trial advocate must not be a trial witness in the same case except in extraordinary, delineated circumstances. Convincing the courts, other attorneys, parties, and legislators that the guardian ad litem is not the same as a social worker or private investigator is an ongoing struggle. The Wisconsin Supreme Court, in *Hollister v. Hollister*, [173 Wis. 2d 413](#), [496 N.W.2d 642](#) (1992), a family law case, after discussing that the guardian ad litem is a trial advocate, not a witness, stated that the guardian ad litem cannot be called as a witness. The court further directed, “The attorney acting as guardian ad litem for the child’s best interests is to be treated as any other attorney acting as an advocate for a party in the proceeding.” *Id.* at 419. The court went on to say that certain earlier cases may have left the impression, incorrectly, that the guardian ad litem is more than simply an advocate “and has other powers that advocates do not possess, particularly the ability to present a report and represent facts to the court.” *Id.* at 419–20. The court specifically rejected the argument that the guardian ad litem could present facts outside the record to the circuit court. *Id.* at 420.

Shortly after issuing its opinion in *Wiederholt v. Fischer*, [169 Wis. 2d 524](#), [485 N.W.2d 442](#) (1992), the court, in *Andrew J.N. v. Wendy L.D. (In re Paternity of Stephanie R.N.)*, [174 Wis. 2d 745](#), 774, [498 N.W.2d 235](#) (1993), reiterated that a guardian ad litem’s statements at oral argument “are not evidence and not part of the record” and that those arguments must be supported by evidence. See also *Metropulos v. Metropulos*, No. [2006AP3105-FT](#), 2007 WL 1247036, ¶ 9 (Wis. Ct. App. May 1, 2007) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), in which the appellate court stated succinctly, “a guardian ad litem’s report is not evidence.”

Comment. Before *Metropulos*, other appellate cases reflected the courts’ confusion on this aspect of guardian ad litem work. For example, see *Kettner v. Kettner*, [2002 WI App 173](#), [256 Wis. 2d 329](#), [649 N.W.2d 317](#), and *Goberville v. Goberville*, [2005 WI App 58](#), [280 Wis. 2d 405](#), [694 N.W.2d 503](#). In *Kettner*, the circuit court included a letter of the guardian ad litem in the file (although not in evidence) and referred to it while orally announcing its decision. The appellate court did not address how the circuit court used the letter because it held the father forfeited the issue on appeal by failing to object to the circuit court’s actions contemporaneously. *Kettner*, [2002 WI App 173](#), ¶¶ 17–21, [256 Wis. 2d 329](#). In *Goberville*, the appellate court looked at the guardian ad litem’s written report but ultimately concluded that it could not determine what information the guardian ad litem relied on to reach the recommendation and that the report was written too early, before a temporary placement schedule had gone into effect. The court of appeals, without comment, listed the guardian ad litem report as falling under the statutory factor of “reports of appropriate professionals if admitted into evidence.” [Wis. Stat.](#) § 767.24(5)(am)15. (2003–14) (since renumbered as [Wis. Stat.](#) § 767.41(5)(am)13.). *Goberville*, [2005 WI App 58](#), ¶ 8 & n.6, [280 Wis. 2d 405](#). *Goberville* implied that had the guardian ad litem’s report been up to date and based on the statutory factors, the circuit court could have relied on it as a professional report.

Two unpublished cases also treat the guardian ad litem's report as evidence. In *Doerr v. Doerr*, No. [95-3513](#), 1996 WL 694170 (Wis. Ct. App. Dec. 5, 1996) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), the court of appeals treated the guardian ad litem's report as evidence on which the circuit court could base its decision. Likewise, in *Pautsch v. Pautsch*, No. 81-1443, 1982 WL 171752 (Wis. Ct. App. Oct. 8, 1982) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), the appellate court treated the guardian ad litem's report as a report of an appropriate professional, citing [Wis. Stat.](#) § 767.24(2) (since renumbered as [Wis. Stat.](#) § 767.41(5)), prescient of the language used by the court in the *Goberville* case. All of these cases predated the clear edict of the *Metropulos* case, which is itself unpublished.

Practice Tip. As a rule, the guardian ad litem should never write a report that could be mistaken for an evidentiary document. Particularly in family court, if a court insists that a guardian ad litem write a report, the guardian ad litem should craft a “trial brief” and tie each conclusion to a piece of evidence that will be presented at trial. Drafting what amounts to a social worker report is not only misleading and improper under the Rules of Professional Conduct and case law, but it may also lead to future practical complications. See *infra* § [1.22](#).

In stark contrast to the fiat that guardians ad litem are trial lawyers, not witnesses, certain statutes require or permit the guardian ad litem to make “reports” or statements to the court. For example, [Wis. Stat.](#) § 767.407(4) requires the guardian ad litem in family court to express the wishes of the child as to custody and placement unless the child requests otherwise. Similarly, the guardian ad litem must investigate and report to the court on whether there is evidence that either parent has engaged in interspousal battery or domestic abuse. [Wis. Stat.](#) § 767.407(4). The guardian ad litem must also “comment to the court” on any mediation agreements and about the parties’ parenting plans. *Id.* In guardianship appointments under [Wis. Stat.](#) ch. 54, the guardian ad litem must report to the court (on a mandatory form, Form [GN-3160](#)) concerning whether the individual’s advance planning is adequate to preclude the need for guardianship. [Wis. Stat.](#) § 54.40(4)(d)3. Indeed, one section of the statutes requires the guardian ad litem to report to the presiding court whether the allegations in a petition (for involuntary administration of psychotropic medications) are “true.” [Wis. Stat.](#) § 55.14(5). Examples like these can be found throughout the statutes and are embodied in mandatory court forms, so the guardian ad litem must constantly bear in mind that the guardian ad litem cannot be a witness except when the statutes, case law, or mandatory court forms require it. See *infra* [ch. 6](#) (discussing mandatory court forms in guardianship proceedings under [Wis. Stat.](#) ch. 54).

D. Liability: Quasi-Judicial Immunity [§ 1.11]

As the courts have been developing the law relating to ethical practice by guardians ad litem, they have also been developing the law relating to a guardian ad litem’s liability. In *Paige K.B. v. Molepske*, [219 Wis. 2d 418](#), [580 N.W.2d 289](#) (1998), a family law case, the Wisconsin Supreme Court extended “quasi-judicial immunity” to guardians ad litem. The court concluded that the guardian ad litem’s function is “intimately related” to the circuit court’s function. *Id.* ¶¶ 14, 16. The supreme court explained that the guardian ad litem serves an essential role in filling a void created by a circuit court’s practical inability to independently investigate and represent the best interests of the child. *Id.* ¶ 15. The court concluded that the guardian ad litem “is absolutely immune from negligence liability for acts within the scope of that guardian ad litem’s exercise of his or her statutory responsibilities.” *Id.* ¶ 16. The court, in considering the public policy of extending quasi-judicial immunity, stated, “We therefore conclude that, from a public policy perspective, it is better to have a diligent, unbiased, and objective advocate to assist the court in determining and protecting the best interests of the child than it is to assure that the minor child may later recover damages in tort.” *Id.* ¶ 25. In reaching this conclusion, however, the court noted that the guardian ad litem’s activities are constrained by statute, the Rules of Professional Conduct, and the supervision of the appointing court. *Id.* ¶ 26.

Comment. *Paige K.B.* is a family law case, and the Wisconsin Supreme Court has not specifically extended its holding to other areas of guardian ad litem practice. Nevertheless, the reasoning in *Paige K.B.* would seem to apply to guardian ad litem practice as a whole.

In *Evans v. Luebke*, [2003 WI App 207](#), [267 Wis. 2d 596](#), [671 N.W.2d 304](#), stemming from an underlying personal-injury action involving minors, the court was asked to extend the *Paige K.B.* immunity holding to protect a guardian ad litem. The court initially noted that the *Paige K.B.* decision was limited to family court, but then went on to analyze the fact situation in the case before it. The court then held that quasi-judicial immunity did not extend to protect the guardian ad litem’s actions (violations of court orders) because the claim before the court was for sanctions and did not allege any damages based on negligence. “Accordingly, the immunity rule established in *Paige K.B.* does not apply.” *Id.* ¶ 14. Had the claim against the guardian ad litem in *Evans* been based in negligence, the opinion signaled that the court likely would have extended the *Paige K.B.* immunity beyond the family-law context.

A guardian ad litem may also face liability if acting outside the bounds of what is required of guardians ad litem. A guardian ad litem is not a social worker or a law enforcement officer. In *Lenz v. Winburn*, [51 F.3d 1540](#) (11th Cir. 1995), the court held that the guardian ad litem acted outside the scope of her discretionary authority under Florida law by providing direct care to the child in assisting a social services investigator in removing the child and her belongings from her father's home. Thus, to avoid liability, a guardian ad litem must not act beyond the scope of the statutorily required responsibilities.

Read together, these cases extend immunity to the guardian ad litem acting within the scope the appointment. It naturally follows that if that appointment has expired, the guardian ad litem has no immunity for acts by the attorney who *was* the guardian ad litem. A guardian ad litem who undertakes actions based on an expired appointment is acting outside the scope of the appointment because the appointment is no longer in effect.

E. Office of Lawyer Regulation [§ 1.12]

Most grievances made to the Office of Lawyer Regulation (OLR) come from clients and adverse parties. Less frequently, complaints are made by individuals, other lawyers, judges, or interested parties against a guardian ad litem. See OLR, *The Lawyer Regulation System: FY 2022–23 Annual Report* 11, <https://www.wicourts.gov/courts/offices/docs/olr2023fiscal.pdf>. Anecdotally, many complaints lodged against guardians ad litem involve diligence ([SCR 20:1.1](#)) and communication ([SCR 20:1.4](#)). Because guardians ad litem are lawyers, they are subject to the same process as any other lawyer once a complaint has been made to the OLR. The OLR undoubtedly dispatches many of these complaints early in the process because they often are not within the scope of the ethics rules. For example, complaints that the guardian ad litem “was biased” or “was mean to me when I was on the witness stand” or “should have made a different recommendation” will not gain traction with the OLR. But other complaints that *do* allege conduct in violation of the ethics rules—e.g., claims that the guardian ad litem never met with the parties, failed to conduct any kind of investigation, or failed to follow a statutory mandate—should merit full review. From a practical standpoint, it is important for guardians ad litem to keep thorough records of their (attempted) communications with the parties, efforts made throughout their investigation, and any evidence they have received in support of their recommendation. Guardians ad litem must consistently and regularly ensure that they are in full compliance with the Rules of Professional Conduct.

IV. Court Appointment of Guardians ad Litem [§ 1.13]

A. Overview [§ 1.14]

Guardians ad litem in all areas of law must be court appointed. A guardian ad litem has no authority or standing until appointed by a court.

The inclusive guardian ad litem statute, applicable to all guardian ad litem appointments, is [Wis. Stat. § 757.48](#). Courts also have authority to appoint guardians ad litem in certain circumstances under [Wis. Stat. § 803.01\(3\)](#). Appointments in children's court cases (including minor guardianships of the person), family law proceedings, guardianships under [Wis. Stat. ch. 54](#), and protective services or placement proceedings also have area-specific appointment statutes. For more information about these separate statutes, see the individual chapters in this handbook.

Each county has its own system of appointing guardians ad litem; the systems vary widely county to county and even court by court in the same county. A qualified lawyer seeking guardian ad litem appointments must initially decide what type of appointments to pursue (family court, children's court, adult or minor guardianship cases, protective services or placement cases, or injunction proceedings). Once that decision is made, the lawyer must determine how to sign up to receive those types of appointments. The process is different in every county and may vary within counties depending on the type of appointment. In some counties, a lawyer might simply contact a central office (the clerk of court or the register in probate) and ask to be placed on the appointment list. Depending on the county and the type of appointment, judges and commissioners might maintain their own lists of potential guardians ad litem, so the lawyer would need to contact the individual court offices, not a central office. Sometimes, guardian ad litem appointments for certain types of cases are limited to those lawyers who are under contract with the county, so the potential guardian ad litem would need to explore how to apply to become one of the lawyers on the contract.

B. Training Requirements: Overview of Common Elements of SCR ch. 35 and SCR ch. 36 [§ 1.15]

The Wisconsin Supreme Court has established training requirements for lawyers seeking appointment as guardians ad litem in most areas of practice. [SCR](#) ch. 35 establishes training requirements for guardians ad litem appointed to represent the interests of children in actions or proceedings under [Wis. Stat.](#) ch. 48 (children’s court), [Wis. Stat.](#) ch. 938 (juvenile court), and [Wis. Stat.](#) ch. 767 (family court). [SCR](#) ch. 36 establishes training requirements for guardians ad litem appointed to represent the interests of adults in actions or proceedings under [Wis. Stat.](#) ch. 54 (guardianship) or [Wis. Stat.](#) ch. 55 (protective placement or services). This section explains the common aspects of the two rules.

Both rules require the Board of Bar Examiners (BBE) to approve “courses of instruction at a law school in this state and continuing legal education [CLE] activities.” [SCR](#) 35.03(1); [SCR](#) 36.03(1). When the BBE posts approved CLE courses on its website, see <https://www.wicourts.gov/services/attorney/edu.htm> (updated July 16, 2024), the posting shows whether the BBE has approved the course for either adult or minor guardian ad litem credits (with a separate category for “family court guardian ad litem education,” see [SCR](#) 35.03(1m)(a)). Providers seeking CLE credits for their workshops should seek guardian ad litem credits when appropriate. Attendees may also request guardian ad litem-credit approval for courses if the provider overlooked that aspect of the approval request. See [SCR](#) 31.08.

The requirements of [SCR](#) ch. 35 and [SCR](#) ch. 36 are self-policing. The lawyer does not receive a certificate or any kind of certification of eligibility to accept guardian ad litem appointments. Instead, the lawyer’s acceptance of a guardian ad litem appointment constitutes the lawyer’s representation that the lawyer is qualified to accept the appointment under the rules. [SCR](#) 35.02; [SCR](#) 36.02. Both rules cross-reference [SCR](#) 20:3.3 “Candor toward the tribunal,” unambiguously indicating that if an unqualified lawyer accepts a guardian ad litem appointment, the lawyer has violated that section of the Rules of Professional Conduct.

The CLE requirements for both rules are based on a multi-cycle model. Lawyers in Wisconsin must report to the BBE 30 credits of CLE every two years. [SCR](#) 31.02; [SCR](#) 31.03. The guardian ad litem training requirements are based on courses taken in the *current* two-year reporting cycle combined with courses taken in the *immediately preceding* two-year reporting period. To calculate eligibility under either rule, the lawyer would first ask: How many guardian ad litem credits approved under this rule did I accumulate during my *most recent, completed* reporting period? The lawyer would then ask: On the date I plan to accept the appointment, how many guardian ad litem credits approved under this rule have I taken during my *current, not-yet-completed* reporting period? Adding the resulting numbers together, the lawyer would know how many guardian ad litem credits the lawyer has attained under the rule. The lawyer calculates this number as of the date of accepting the appointment.

Both rules also incorporate a legal “out” for the court to appoint a guardian ad litem who lacks the requisite training. A lawyer without the required training may still be eligible to accept the guardian ad litem appointment if the appointing court makes a finding in writing or on the record that the action or proceeding presents “exceptional or unusual circumstances” for which the lawyer is otherwise qualified by experience or expertise. [SCR](#) 35.01(3); [SCR](#) 35.015(2); [SCR](#) 36.01(3). The written or on-the-record finding would presumably specify what “exceptional or unusual circumstances” are presented by the case that permits appointing an otherwise-unqualified guardian ad litem.

For a step-by-step guide to determine whether a lawyer is eligible to serve as a guardian ad litem under either [SCR](#) ch. 35 or [SCR](#) ch. 36, see Gretchen Viney, *GAL Appointments: Am I Eligible?*, Wis. Law., Sept. 2020, at 14.

C. Specific Training Requirements: Guardian ad Litem-Minor in Children’s Court and Juvenile Court [§ 1.16]

[SCR](#) 35.01 sets out the training requirements that are specific to accepting guardian ad litem appointments for minors under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938. [SCR](#) 35.01(1) authorizes acceptance if the lawyer has attained 30 hours of approved guardian ad litem-minor CLE. If a lawyer has met this “lifetime” requirement, the lawyer has met the training requirements.

If the lawyer has not met the lifetime training requirements, then the lawyer may accept the appointment if, on the date the lawyer accepts the appointment, the lawyer has completed six hours of approved guardian ad litem-minor CLE credits during the *current* reporting period combined with the *immediately preceding* reporting period. [SCR](#) 35.01(2). See *supra* § 1.15.

A lawyer who does not meet the training requirements at all may accept an appointment only if the court has made the requisite finding that would allow the court to appoint an otherwise-unqualified guardian ad litem. [SCR](#) 35.01(3). See *supra* § 1.15.

[SCR 35.03\(1\)](#) requires the BBE to approve courses and CLE activities that the BBE determines to be on the subject of the role and responsibilities of a guardian ad litem for a minor or on the subject matter of proceedings under [Wis. Stat.](#) ch. 48, 767, or 938 and that are designed to increase the attendee's professional competence to act as a guardian ad litem in those proceedings.

D. Specific Training Requirements: Guardian ad Litem-Minor in Family Court [§ 1.17]

Family court ([Wis. Stat.](#) ch. 767) guardians ad litem have additional requirements under [SCR](#) ch. 35 that are laid out in [SCR 35.015](#). Under this dedicated rule, before accepting an initial appointment as guardian ad litem, the lawyer must have completed at least nine credits of guardian ad litem-minor training approved under [SCR 35.03](#). [SCR 35.015\(1\)](#). Of those credits, three must be approved education addressing the topic of family violence, and three more of these credits must be approved education on any of the topics listed as “family court guardian ad litem education” under [SCR 35.03\(1m\)\(a\)](#). The balance can be any type of guardian ad litem-minor or guardian ad litem-family credits.

Note. [SCR 35.03\(1m\)\(a\)](#) sets out the subject matter of the courses and activities that the board may approve as “family court guardian ad litem education”: (1) proceedings under [Wis. Stat.](#) ch. 767; (2) child development; (3) the effects of conflict and divorce on children; (4) mental health issues in divorcing families; (5) dynamics and impact of family violence; and (6) sensitivity to various religious backgrounds, racial and ethnic heritages, and issues of cultural and socioeconomic diversity. The BBE may approve as family court guardian ad litem education only courses and activities conducted after June 1, 2002.

Once the guardian ad litem satisfies the initial requirements under [SCR 35.015\(1\)](#), then for other appointments (during the combined current CLE reporting period and the immediately preceding CLE reporting period), the required credits reduce to six overall, with one credit being on the topic of family violence, at least two on topics listed as family court guardian ad litem education under [SCR 35.03\(1m\)\(a\)](#), and the balance on any approved guardian ad litem-minor or guardian ad litem-family education topics. [SCR 35.015\(1m\)](#). Credits approved as family court guardian ad litem education credits automatically qualify as guardian ad litem-minor education credits. See [SCR 35.01 cmt.](#), *reprinted in* Wis. Sup. Ct. Order 19-13, 2020 WI 72, ___ Wis. 2d ___.

The BBE will not separately approve “family violence” credits. Individual guardians ad litem must keep track of whether a BBE-approved CLE seminar covered that topic. [SCR](#) ch. 35 does not require that the family violence credits be stand-alone components of a workshop. This contrasts, for example, with ethics and professional responsibility (EPR) credits, which each must be separate segments “of at least one continuous hour,” [SCR 31.07\(5\)](#).

Note. A guardian ad litem in family court does not have the “lifetime” 30-credit benefit. A guardian ad litem in family court must meet the six-credit requirement for every appointment, no matter how long the guardian ad litem has been practicing. See [SCR 35.015](#).

A lawyer who does not meet the training requirements may accept an appointment only if the court has made the requisite finding that would allow the court to appoint an otherwise-unqualified guardian ad litem. [SCR 35.015\(2\)](#). See *supra* § 1.15.

The Wisconsin Legislature also entered the field of regulating family court guardian ad litem training. [Wis. Stat.](#) § 757.48(1)(a) purportedly adds another training requirement for a family court guardian ad litem. This section requires the guardian ad litem to have completed “3 hours of approved continuing legal education that relates to the functions and duties of a guardian ad litem under [[Wis. Stat.](#)] ch. 767 and that includes training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.”

Comment. A threshold (but not yet answered) question is whether the legislature is constitutionally prohibited from imposing this prerequisite for a lawyer to serve as guardian ad litem in Wisconsin courts because the Wisconsin Supreme Court has the authority to regulate the practice of law. *In re Integration of Bar*, 5 Wis. 2d 618, 622, 93 N.W.2d 601 (1958). This authority may be shared in certain limited circumstances. *State ex. rel. Friedrich v. Circuit Ct. for Dane Cnty.*, 192 Wis. 2d 1, 531 N.W. 2d 32 (1995).

Even apart from the constitutional issue, the statute is ambiguous in its practical application. The primary issue is that the statute does not explain how often the guardian ad litem must complete the three hours of approved continuing legal education on the topic of domestic violence. The legislature, in invoking “approved continuing legal education,” surely intended to piggyback this requirement into [SCR](#) ch. 35. Yet the legislature did not specify whether the guardian ad litem would meet the requirement by completing the three credits once or whether the guardian ad litem would need to complete three credits of domestic violence training more often (either during the 30-credit two-year reporting cycle for attorneys generally or during the multi-cycle reporting

period that the guardian ad litem uses to determine eligibility). It seems unlikely in the extreme that the legislature intended that a guardian ad litem consistently devote all three of the required family court education credits to domestic violence training during the credit cycle. More likely is that once a guardian ad litem has had three credits of domestic violence training, the requirement is met for the guardian ad litem's lifetime. That being said, the guardian ad litem does not have a lifetime credit threshold for family court appointments, so assigning a lifetime threshold to the three-credit requirement may be inconsistent with that policy. To date, attorneys have no direction from the supreme court about whether, or how, to apply [Wis. Stat. § 757.48\(1\)](#).

E. Specific Training Requirements: Guardian ad Litem-Adult [§ 1.18]

[SCR](#) ch. 36 applies to guardians ad litem appointed to represent adults in [Wis. Stat.](#) ch. 54 (guardianships) and [Wis. Stat.](#) ch. 55 (protective placement and services).

[SCR](#) 36.01(1) authorizes acceptance of the appointment if the lawyer has attained 30 hours of approved guardian ad litem-adult CLE courses or activities. If a lawyer has met this "lifetime" requirement, the lawyer has met the training requirements.

If the lawyer has not met the lifetime training requirements, then the lawyer may accept the appointment if, on the date the lawyer accepts the appointment, the lawyer has completed six hours of approved guardian ad litem-adult CLE credits during the *current* reporting period combined with the *immediately preceding* reporting period. [SCR](#) 35.01(2). See discussion of this multi-cycle model in section [1.15](#), *supra*.

A lawyer who does not meet the training requirements at all may accept an appointment only if the court has made the requisite finding that would allow the court to appoint an otherwise-unqualified guardian ad litem. [SCR](#) 36.01(3). See *supra* § [1.15](#).

[SCR](#) 36.03(1) requires the BBE to approve courses and CLE activities conducted after January 1, 1995, that it determines to be on the subject of the role and responsibilities of a guardian ad litem for an adult or on the subject matter of proceedings under [Wis. Stat.](#) ch. 54 or 55 and that are designed to increase the attendee's professional competence to act as a guardian ad litem for an adult in those proceedings.

F. Gaps in Training Requirements [§ 1.19]

In some situations, guardians ad litem need not meet the training requirements of either [SCR](#) ch. 35 or [SCR](#) ch. 36. For example, Wisconsin has no training requirements for a guardian ad litem appointed to represent a minor in a guardianship of the estate action under [Wis. Stat.](#) ch. 54. The only training requirement for [Wis. Stat.](#) ch. 54 guardians ad litem is in [SCR](#) ch. 36, which applies, by its specific terms, only to guardians ad litem for adults. Although [SCR](#) ch. 35 establishes a training requirement for guardians ad litem representing the interest of minors, [SCR](#) ch. 35 applies, by its terms, only to [Wis. Stat.](#) ch. 48, [Wis. Stat.](#) ch. 938, and [Wis. Stat.](#) ch. 767. While a guardian ad litem is required for a minor involved in a guardianship of the estate action ([Wis. Stat.](#) § 54.40(1)), a guardian ad litem appointed in that circumstance would not be required by the supreme court rules to meet the training requirements of either [SCR](#) ch. 35 or [SCR](#) ch. 36.

Likewise, on occasion, courts will appoint a guardian ad litem to represent adults who are "adjudicated incompetent or alleged to be incompetent" in civil court under the authority of [Wis. Stat.](#) § 803.01(3). These appointments sometimes occur in divorce cases under [Wis. Stat.](#) ch. 767 in which one spouse is exhibiting signs of "incompetence" in dealing with the divorce. While reasonable debate exists as to the authority or responsibilities of a guardian ad litem appointed pursuant to that statute, what is clear is that the guardian ad litem need not meet the training requirements of either [SCR](#) ch. 35 or [SCR](#) ch. 36. Only [SCR](#) ch. 35 applies to [Wis. Stat.](#) ch. 767, and [SCR](#) ch. 35 regulates only guardians ad litem appointed to represent minors.

Courts also appoint guardians ad litem for minors in injunction matters, for missing heirs in probate cases, for minors in personal-injury settlement cases, and even, on occasion, for victims in criminal court. As written, [SCR](#) chs. 35 and 36 do not apply to guardians ad litem appointed in those situations.

G. Payment of the Guardian ad Litem [§ 1.20]

Guardians ad litem are not unpaid volunteers. As court-appointed lawyers, guardians ad litem are entitled to compensation, although the amount of compensation and the source of payment vary from county to county and among courts in the same county

and also depend on the type of case and the assets of the parties. A lawyer appointed as a guardian ad litem should always know the payment system before accepting the appointment.

For specific permutations of the payment systems, and the problems encountered because of them, see the individual chapters in this handbook. For quick reference, the compensation statutes are [Wis. Stat.](#) §§ 48.235(8) (children's court), 54.74 (guardianships under [Wis. Stat.](#) ch. 54), 757.48 (general), 767.407(6) (family court), and 879.23(4)(d) (probate), and the rules are [SCR](#) 81.01 and [SCR](#) 81.02.

As a baseline, a guardian ad litem is entitled to reasonable compensation. [Wis. Stat.](#) §§ 757.48(1)(b), 767.407(6), 54.74. The proper measure of compensation is less certain. If a county uses a private-pay system, so that the parties pay the guardian ad litem directly, the compensation will be at whatever hourly rate the judge deems reasonable for the case and for the attorney appointed as guardian ad litem. If, however, the court orders the county to pay all or part of the guardian ad litem's fees, then various statutes direct that the ordered rate cannot exceed the public defender rate in [Wis. Stat.](#) § 977.08(4m). See, e.g., [Wis. Stat.](#) §§ 54.74, 757.48(1)(b), 767.407(6), 891.39(1)(b) (paternity), 938.235(8). For appointments after July 1, 2023, [Wis. Stat.](#) § 977.08(4m)(e) provides for compensation of \$100 per hour (with separate compensation for qualifying travel). For compensation rates for appointments before July 1, 2023 (and after January 1, 2020), see [Wis. Stat.](#) § 977.08(4m)(d).

Although the statutes typically base guardian ad litem compensation on an hourly billing rate, the supreme court rules allow counties to enter into contracts with guardians ad litem, who are then paid according to the terms of the contracts. [SCR](#) 81.02(1m). Those terms may be based on compensation arrangements that might include flat fees per referral, compensation at an hourly rate but with a cap on the number of hours, monthly payments covering all referrals, or a county-specific hybrid system. The contracts might pay less than the per-hour baseline of [SCR](#) 81.02(1).

Because of the uncertainty of the compensation system, a guardian ad litem accepting an appointment should always confirm who is responsible for payment of fees and at what rate and also calculate the risk for nonpayment. The compensation system should be set out unambiguously in the court's order appointing the guardian ad litem. If the case is a private-pay case (for example, a family law case in which the parties have assets), the guardian ad litem would do well to require a deposit into the court or into the guardian ad litem's trust account to cover the potential fees.

V. Selected Challenges [§ 1.21]

A. Litigation Issues [§ 1.22]

In recent years, guardians ad litem have increasingly faced litigation issues because zealous litigators misunderstand the role of the guardian ad litem. Some lawyers serve guardians ad litem with civil discovery requests ([Wis. Stat.](#) ch. 804) such as interrogatories, requests for admission, and requests for production of documents. The guardian ad litem is not a party, so the guardian ad litem is not personally subject to discovery demands. Moreover, the guardian ad litem has no client who can respond to discovery; the guardian ad litem's client is the concept of best interests, not a person. Guardians ad litem have responded to these discovery demands by ignoring them and then resisting motions to compel, by bringing their own motions to quash or dismiss, or by informally educating the lawyer seeking discovery.

A related issue is that lawyers sometimes subpoena guardians ad litem as witnesses in separate but related litigation. Lawyers and courts have come to understand that the guardian ad litem cannot be a witness in the case-in-chief (see *supra* § [1.10](#)). Often, however, a guardian ad litem has information that would be material in a separate proceeding in which the lawyer is *not* the guardian ad litem. For example, in a family law case, perhaps the guardian ad litem learned something about the father's (married) girlfriend that would be material in a later divorce action between the girlfriend and her husband. Could the guardian ad litem be subpoenaed to provide the information in that action? Of course, compelling this kind of testimony would present a host of systemic problems. Testifying in court is certainly outside the scope of the guardian ad litem's initial appointment, so quasi-judicial immunity would not apply. See *supra* § [1.11](#). The guardian ad litem would not be paid for the time (except via witness fees in the pending litigation). The pending case may be outside the county in which the guardian ad litem was appointed and therefore away from the protection of the original appointing court. One can imagine the chilling effect on the system were guardians ad litem subject to subpoenas in separate but related cases.

Comment. To date, guardians ad litem have resisted these subpoenas by claiming work-product protection; by asserting protection from discovery by virtue of their status as trial lawyers, not witnesses; and by seeking protection from the circuit court on the public-policy ground that a guardian ad litem should not be compelled to be involved in a case outside the one of the original appointment. A guardian ad litem can almost certainly avoid this situation altogether if the guardian ad litem refuses to write a report that looks like evidence. Particularly in family law matters, the court-appointed guardian ad litem should never write a report because it is the report in one case that can lead to a subpoena in another. A guardian ad litem will never be subpoenaed on the basis of a “trial brief,” but a “report” that looks like evidence may well invite a subpoena. See related discussion in section [1.10](#), *supra*.

B. Difficult Situations and People [§ 1.23]

A guardian ad litem is appointed in the context of a court proceeding, a proceeding that often the parties do not want or understand and may resent. The guardian ad litem is often on the front line of dealing with the thoughts and emotions of individuals in the case. As a result, the work of the guardian ad litem is often scrutinized and criticized by parties, their attorneys, or even third parties. The guardian ad litem may be the target of creative and ill-founded attacks, so the guardian ad litem must be vigilant in predicting possible exposure and should document everything to the extent possible. The guardian ad litem should expect scrutiny of every invoice by litigious individuals.

Everything a guardian ad litem does, or does not do, is potentially subject to criticism and to review by the court of appeals and the supreme court. Creating a solid record is crucial to surviving these court reviews. See, for example, *Manitowoc County Human Services Department v. Rebecca H. (In re Termination of Parental Rights to Erica W.)*, Nos. [2013AP421](#), [2013AP422](#), 2014 WL 223755, ¶¶ 12–14 (Wis. Ct. App. Jan. 22, 2014) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), in which the court of appeals found the oral court record adequate to support valid waiver by the parties of the guardian ad litem’s potential conflict of interest in a termination-of-parental-rights case when, among other things, the guardian ad litem had briefly represented the mother in a children’s court case involving the same child.

Often, complaints about guardians ad litem are quite fact-specific so the appellate cases ultimately deciding the issues are unpublished. While these opinions are not citable, they certainly add to the lore about guardian ad litem work and its pitfalls. And, of course, every appeal centered on the activities of the guardian ad litem requires the guardian ad litem to expend often vast amounts of time responding to the various issues and allegations.

Consider the extensive line of cases beginning with *Kramschuster v. Schwefel*, No. [2010AP3020](#), 2012 WL 264575 (Wis. Ct. App. Jan. 31, 2012) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In *Kramschuster*, a child’s maternal grandfather and the child’s mother appealed from the circuit court order approving the guardian ad litem’s actions in pursuing a contempt action against the mother. In this case, the court of appeals extended the holding of *Paige K.B. v. Molepske*, [219 Wis. 2d 418](#), 421, 427–28, [580 N.W.2d 289](#) (1998) (applying [Wis. Stat.](#) § 767.045(4) (1993–94)), which afforded absolute quasi-judicial immunity for acts of alleged negligence, to provide immunity for acts allegedly done with “improper motive or malice.” *Kramschuster*, 2012 WL 264575, ¶ 10 (citing *Scarpaci v. Milwaukee Cnty.*, [96 Wis. 2d 663](#), 701, [292 N.W.2d 816](#) (1980)). See discussion of *Paige K.B.* in section [1.17](#), *supra*. The *Kramschuster* court was not condoning malicious acts; rather, it recognized that the guardian ad litem’s job involves deliberate acts and that the court will not question the guardian ad litem’s motives if the acts are within the scope of the guardian ad litem’s role.

The mother from *Kramschuster* pursued the matter on a different basis to the court of appeals in *State v. Przytarski (In re Paternity of Sarah L.V.–K.)*, No. [2012AP1413](#), 2013 WL 3814968, ¶¶ 2, 9–10 (Wis. Ct. App. July 24, 2013) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). *Przytarski* held that the circuit court does not become a guardian ad litem’s advocate merely by reviewing the guardian ad litem’s conduct in a status hearing under [Wis. Stat.](#) § 767.407(4m) and by explaining that the guardian ad litem represents the child’s best interest as the guardian ad litem perceives it and not how the parent may perceive it.

In yet another related proceeding, *Kramschuster v. Schwefel*, No. [2015AP1266](#), 2016 WL 483621 (Wis. Ct. App. Feb. 9, 2016) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), the child’s maternal grandparents appealed from a small claims court dismissal of their action against the guardian ad litem for “theft” in accepting court-ordered payments (guardian ad litem fees) from the grandparents. The court of appeals affirmed the dismissal on the ground that the family court that issued the underlying order for guardian ad litem fees was the court that needed to address the grandparents’ claim. In this situation, the guardian

ad litem was required to defend a small claims action in another county and, although the court of appeals ultimately affirmed the lower court's dismissal, the guardian ad litem still had to take the time to litigate the case.

The case was again in the court of appeals in *In re Finding of Contempt in Przytarski v. Vallejos*, No. [2016AP1122](#), 2017 WL 6614561 (Wis. Ct. App. Dec. 27, 2017) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), in which the guardian ad litem's action against the parties who were ordered to pay the guardian ad litem fees went up to the court of appeals on a different issue (whether another party was in contempt as well) raised by those parties. The case did not end there. The litigants continued to dispute the guardian ad litem fees, and the case came before the court of appeals again in 2019. The court once again upheld the guardian ad litem's position. *Schwefel v. Przytarski (In re Contempt in Przytarski v. Vallejos)*, No. [2019AP52](#), 2019 WL 5884135 (Wis. Ct. App. Nov. 12, 2019) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

Sometimes, individuals complain that the guardian ad litem did not conduct an adequate investigation. The courts recognize that the extent of the guardian ad litem's investigation and recommendations can be a function of the factual situation. In *Salim v. Salim*, No. [2012AP70](#), 2013 WL 5525721 (Wis. Ct. App. Oct. 8, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), the father, who was incarcerated, argued that the circuit court erred when it failed to allow him to challenge the guardian ad litem's report. At trial, the guardian ad litem stated that he had interviewed all the parties, including the children, examined the criminal court records, and conducted an investigation. He also pointed out that, given the father's sentence structure, it was quite likely that by the time the father served his sentence, all his children would be adults. In addition, the guardian ad litem told the court that his investigation of the father's immigration status revealed that the government was in the initial stages of deporting him to Jordan. *Id.* ¶ 4. The court of appeals noted that the guardian ad litem gave only an oral report at the trial, so there could be no challenge to a written report. *Id.* ¶ 14. The court of appeals found that the guardian ad litem's activities were reasonable under the circumstances.

Courts might deter continued litigation by mandating payment of guardian ad litem fees by particularly litigious individuals. *See, e.g., Dugan v. Lukens (In re Paternity of J.V.L.)*, No. [2011AP2148](#), 2013 WL 978185 (Wis. Ct. App. Mar. 14, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)); *see also Seiler v. Riha*, Nos. [2011AP1319](#), [2011AP1485](#), 2013 WL 5225717 (Wis. Ct. App. Sept. 18, 2013) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The court orders for payment must be based on repetitive or needlessly repetitive litigation. *See Salim*, 2013 WL 5525721, ¶ 12 (citing *Olmsted v. Circuit Ct. for Dane Cnty.*, [2000 WI App 261](#), ¶ 10, [240 Wis. 2d 197](#), [622 N.W.2d 29](#)).

VI. Broader Thoughts: Serving as Guardian ad Litem [§ 1.24]

Given the various issues highlighted in this chapter and in the individual chapters of this handbook, lawyers might wonder why anyone would aspire to guardian ad litem work. The answers are as varied as the individuals who serve as guardian ad litem. Some lawyers accept guardian ad litem appointments because they provide keys to the courthouse. In a time when few controversies are litigated, family law is one area of law in which lawyers regularly appear in court. Guardian ad litem work also introduces the lawyer to the other lawyers and to the county court system, so it provides an excellent opportunity to acclimate to the legal community.

Many lawyers appreciate the freedom as a guardian ad litem to be creative in representing a "concept," not constrained by the demands of a live client. "Doing what's best" rather than "doing what the client says" is attractive to many guardians ad litem.

Some lawyers accept guardian ad litem appointments as part of their professional obligation to meet the needs for legal services in the system. *See SCR* 20:6.1(b). Likewise, a guardian ad litem may have an interest in social justice, feeling a call to advocate for individuals who are caught up in the legal system. Sometimes, a lawyer might have prior experience in social work or nursing or teaching or any number of fields that are compatible with the skills used in guardian ad litem practice and decides to put those skills to new use. And, of course, some newer lawyers might accept guardian ad litem appointments because, on balance, low pay is better than no pay.

Guardians ad litem serve some of the most vulnerable individuals in Wisconsin and are a crucial component in the civil justice system. Lawyers may invoke multiple reasons to work as guardians ad litem, but perhaps the most important reason of all is that the courts depend on them.

Chapter 2

Children: The Human Side

David W. Thompson

I. Scope [§ 2.1]

The guardian ad litem (GAL) contributes to important decisions affecting the lives of other people—often children. However, the guardian ad litem may be inadequately prepared to assess a child’s best interests. The guardian ad litem may also feel uncomfortable with the interview process, particularly when children are involved. This chapter seeks to assist guardians ad litem in their work with children by reviewing the stages of child development; exploring the effects on child development that can result from domestic violence, abuse, and neglect, sexual abuse of children, alternative care, termination of parental rights (TPR), and divorce; and suggesting effective approaches to interviews with children. A few special topics are also discussed.¹

Note. The term *guardian ad litem* and the abbreviation *GAL* are used interchangeably throughout this chapter.

II. The Stages of Human Development [§ 2.2]

A. Overview [§ 2.3]

The guardian ad litem needs some familiarity with the stages of human development to understand and represent child clients effectively. Life crises, such as divorce, neglect, and abuse, which create the need for representation by a guardian ad litem, can also adversely affect the course of child development. The guardian ad litem with some understanding of child development will be more successful in recognizing children’s problems and, in turn, representing the children’s *best interests*.

There is no one universally accepted theory of human development; researchers have found many ways of conceptualizing the process. For example, Sigmund Freud, perhaps the most well-known theorist in the field of human development, emphasized the impact of early relationships and sexuality on development, while Jean Piaget stressed cognitive development, and Erik Erikson delineated a series of personality dispositions underlying the “eight stages of man.” See the first appendix to this chapter ([appendix 2A, infra](#)) for an overview of some of the most influential theories of human development.

This chapter takes what is perhaps the most straightforward approach, identifying developmental stages strictly by age: infancy (and the early years), the toddler period, the early school years, early adolescence, and adolescence. While the stages outlined represent a composite picture of human development, it is beyond the scope of this work to cover all variations in typical development. In using this chapter, therefore, it is important to remember that people are unique and that no two developmental histories will look exactly alike.

B. Infancy and the Early Years [§ 2.4]

1. Attachment [§ 2.5]

Children exhibit marked individuality from birth. Their individual differences strongly influence those around them, including their parents. T. Berry Brazelton, *Infants and Mothers: Differences in Development* xviii (rev. ed. 1983) [hereinafter Brazelton, *Infants*]; T. Berry Brazelton, *Toddlers and Parents: A Declaration of Independence* (1974) [hereinafter Brazelton, *Toddlers*]. Infants’ rapid physical, mental, and emotional growth also causes them to be heavily affected by the world around them. The child’s biology and environment interact and, in combination, craft the child’s personality, behavioral tendencies, and cognitive skills. Arnold Gesell et al., *The Child from Five to Ten* 7 (rev. ed. 1977) [hereinafter Gesell et al., *Child*]. For example, during the first six months, an infant’s intelligence quotient (IQ) is highly related to gratification of needs, affectionate exchanges, and age-appropriate stimulation. Princeton Ctr. for Infancy & Early Childhood, *The First Twelve Months of Life: Your Baby’s Growth Month by Month* 88 (Frank Caplan ed., 1973) [hereinafter Caplan].

During the infancy stage, children begin to form attachments with the human beings who care for them. Paul Henry Mussen et al., *Child Development and Personality* 152 (5th ed. 1979) [hereinafter Mussen et al.]. The strength of these attachments depends on the quality of children's relationships with caregivers. Erik H. Erikson, *Childhood and Society* 249 (2d ed. 1963) [hereinafter Erikson]. Infants are entirely dependent on caregivers to meet all their emotional and physical needs; thus, survival and development may depend on the strength and durability of the attachment. Marshall H. Klaus & John H. Kennell, *Maternal-Infant Bonding: The Impact of Early Separation or Loss on Family Development* 39 (1976).

A child who wants to play or who is tired, hungry, afraid, or distressed is most likely to approach the person to whom the child is most attached. This key caregiver is also most successful in soothing or placating the child. When with or near this caregiver, a child shows less fear and apprehension about unfamiliar people or surroundings. Continuing feedback between the infant and the adult, and the association the infant makes between the adult and feelings of contentment, pleasure, and relief of distress contribute to the development of the attachment. Mussen et al., *supra*, at 157. In addition to protecting the child, attachment also facilitates learning. Gay G. Armsden & Mark T. Greenberg, *The Inventory of Parent and Peer Attachment: Individual Differences and Their Relationship to Psychological Well-Being in Adolescence* 2 (1983) [hereinafter Armsden & Greenberg].

There are two kinds of attachments: primary and secondary. A primary attachment is the attachment that is most important to a child and is usually thought of as a relationship between the mother and child. However, children also develop primary attachments with fathers and other caregivers. In fact, studies have shown that "[b]abies with fathers who [help] care for them, [play] with them often, and [are] relatively patient about their fussing [become] attached to them early and intensely." Caplan, *supra*, at 125. Secondary attachments, on the other hand, form between a child and a person who plays a role in the child's life but who is not the child's primary caregiver. Attachments to the primary and secondary caregivers are different and meet different needs of the child. Because these attachment bonds are not interchangeable, one type cannot make up for the other's absence. William N. Bender, *Joint Custody: The Option of Choice*, 21(3/4) J. of Divorce & Remarriage 115, 120 (1994) [hereinafter Bender].

Separation of a child from a primary caretaker can be traumatic. Although children up to three months old exhibit little distress when moved from foster care to adoptive care and are thus removed from a primary caretaker, children from three to seven months old do exhibit some distress. In fact, a child who experiences a change of parents during infancy is generally less able than other children to establish appropriate relationships in later life. Sakinah N. Salahu-Din & Stephan R. Bollman, *Identity Development and Self-Esteem of Young Adolescents in Foster Care*, 11 Child & Adolescent Soc. Work J. 123, 125 (1994) [hereinafter Salahu-Din & Bowman]; Lawrence G. Shelton, *Child Development Research in Court* 8–9 (paper presented at annual meeting of Soc'y for Res. in Child Dev., San Francisco, Mar. 15–19, 1979) [hereinafter Shelton]. Children up to 18 months (about 1 and a half years) often react to separation by refusing food, crying, and developing digestive upsets and sleeping problems. Joseph Goldstein et al., *Beyond the Best Interests of the Child* 32 (new ed. 1979) [hereinafter Goldstein et al., *Beyond*].

A biological parent is not necessarily the psychological parent who develops through attachment. A psychological parent is one who makes a child feel valued and wanted. In contrast, an absent biological parent can become a stranger. *Id.* at 17; Richard J. Gelles, *Family Reunification/Family Preservation. Are the Children Really Being Protected?*, 8 J. of Interpersonal Violence 557, 560 (1993) [hereinafter Gelles]. Thus, separation from substitute parents with whom a child has formed new psychological relationships can be just as damaging as separation from natural parents. Joseph Goldstein et al., *Before the Best Interests of the Child* 41 (1979) [hereinafter Goldstein et al., *Before*]. When faced with a choice between interrupted attachments and no attachments, however, the former is preferable, having less negative effect on normal character development. Anna Freud & Dorothy T. Burlingham, *Infants Without Families: The Case for and Against Residential Nurseries* 63 (1944) [hereinafter Freud & Burlingham, *Infants*].

2. Basics of Physical Maturation and Speech Development During the Early Years [§ 2.6]

At 6 to 10 weeks (about 2 and a half months), an infant begins to reach for objects; however, sleeping still occupies most of the child's time at this stage. Babies begin to roll over and learn to sit without support at approximately 6 months. During the rest of the first year of life, the baby begins to stand alone, walk holding onto furniture, and copy adult speech. Many children walk independently by their first birthday. From one to two years of age, "[t]he great event in the child's life is his new ability to move freely and to control his movements, an ability which progresses quickly from crawling to walking, running, climbing, jumping, and is continued with the handling and moving of objects, as pushing, pulling, dragging, carrying, etc." Freud & Burlingham, *Infants*, *supra* § 2.5, at 14. By two years of age, a child's vocabulary typically ranges from 40 to more than 1,200 words and varies widely in the complexity of phrases and sentences. *Id.* at 7.

C. The Toddler Period [§ 2.7]

A toddler is a child between the ages of one and three. During the toddler period, a child begins to develop self-control. Brazelton, *Toddlers*, *supra* § 2.5, at xi. In addition, although children of this age are not always happy, they are most often optimistic. David Elkind, *A Sympathetic Understanding of the Child: Birth to 16* 73 (1974) [hereinafter Elkind].

A toddler is often sensitive to adult feelings and moods. A toddler “can experience rejection and dislike even when the adult tries to cover these up.” Gesell et al., *Child*, *supra* § 2.5, at 38. This sensitivity may make the toddler feel vulnerable and may change the toddler’s behavior. For example, because the parent’s love is very important to the child, the threat of withdrawal of love can frighten a child into obedience. Anna Freud & Dorothy T. Burlingham, *War and Children* 57 (1943) [hereinafter Freud & Burlingham, *War*]. Further, young children tend to see their parents as all good. Therefore, a toddler may project the parents’ less attractive qualities, motives, and actions onto other people or animals. For example, the child may blame the dog for tripping the child and causing a bruise rather than holding the parent responsible for striking the child.

Children think in concrete terms, often describing themselves in relation to their physical appearance or personal possessions. Thomas M. Brinthaupt & Richard P. Lipka, *Developmental and Sex Differences in the Early Mentions of Kindergarten Through Twelfth Graders’ Spontaneous Self-Perceptions: Implications for Educational Research and Practice* 3 (paper presented at annual meeting of New Eng. Educ. Res. Org., Rockport, Me., Apr. 27–29, 1983) [hereinafter Brinthaupt & Lipka]. They enjoy showing off their new clothes, shoes, cleverness, naughtiness, illness, and naked bodies. But this egocentrism that envelops young children differs from narcissism. This early egocentrism derives from children’s limited points of view and narrow perspectives; young children are unable to appreciate properly that other people see things differently. Theodore Lidz, *The Person: His and Her Development Through the Life Cycle* 206 (rev. ed. 1976) [hereinafter Lidz]. Socially, this egocentrism can make cooperation and effective communication difficult or impossible because the child’s reasoning may be distorted while the child focuses on one aspect of an issue, neglecting all others. Paul Light, *Piaget and Egocentrism: A Perspective on Recent Developmental Research*, 12 *Early Child Dev. & Care* 7 (1983) [hereinafter *Piaget and Egocentrism*].

In divorce, a child may be forced to be separated from a parent in a way that gives one parent only infrequent or even no contact with the child. The disruption caused by this type of nearly total separation from parents often affects children’s achievements; in fact, advances are most likely to be lost. Goldstein et al., *Beyond*, *supra* § 2.5, at 33. For example, a toddler may be less motivated to speak or may regress in toilet training or other areas. Freud & Burlingham, *Infants*, *supra* § 2.5, at 18–21. Children who have experienced separation also tend to develop less trustful attachments in the future. Goldstein et al., *Beyond*, *supra* § 2.5, at 33. In many cases, toddlers who are separated from their parents will transfer the affection they felt for their parents to material objects they have received as presents from their parents. Freud & Burlingham, *War*, *supra* § 2.7, at 155. These objects are often helpful with transitions between homes and should remain with the child during transfers.

D. The Early School Years [§ 2.8]

Children between the ages of four and nine are considered early school aged. A major psychological issue of early school-aged children is the conflict between becoming more autonomous and giving up the dependency prerogatives of childhood. Elkind, *supra* § 2.7, at 68. For example, six-year-olds’ emotions typically vacillate between deep affection and contradictory hate, Gesell et al., *Child*, *supra* § 2.5, at 319, causing both fear and admiration for parents, although more for fathers than for mothers. Seven-year-olds tend to be more easygoing and companionable. Eight-year-olds can be deeply sensitive to their mothers, while simultaneously expressing consuming demands on them. Father-child bonds often strengthen for nine-year-olds. *Id.*

Egocentrism is still strong in children of six to eight years old. Louise Rowling, *Children and Loss* 8 (1982) (Kensington, Austl.: N.S.W. Univ., Sch. of Educ. Selected Papers No. 25) [hereinafter Rowling]. At the same time, awareness of others’ perspectives increases, as do self-awareness and detachment. Ellen Greenberg Garrison, *Children’s Competence to Participate in Divorce Custody Decisionmaking*, 20 *J. of Clinical Child Psych.* 78 (1991) [hereinafter Garrison]; *Piaget and Egocentrism*, *supra* § 2.7, at 16. Yet the reciprocal nature of human relationships remains beyond the comprehension of children in early primary grades. Rowling, *supra*, at 12. Therefore, disruptions in the continuity of care can cause resentment and disappointment in a child and may cause a child not to care for anyone. Goldstein et al., *Beyond*, *supra* § 2.5, at 33–34.

E. Early Adolescence [§ 2.9]

Early adolescents are middle or junior-high school students between the ages of 9 and 16. Early adolescents are concrete yet predominantly logical thinkers with only limited capacity for abstract or formal thought. Hershel D. Thornburg, *Is Early Adolescence Really a Stage of Development?*, 22 *Theory into Prac.* 79, 81–82 (1983) [hereinafter Thornburg]. While social learning characterizes the first eight years of life, early adolescence is the period in which previous social learning is validated. At the beginning of this stage, parents are typically the primary social influence, but, by the stage's end, peer influence has become most important. *Id.* at 82.

Early adolescence is characterized by fluctuations in personality. While individuals vary greatly in their developmental stages, one source described the changes of early adolescence in the following manner: “‘Ten’ is casual and easygoing. ‘Eleven’ is sensitive and self-assertive. ‘Twelve’ is outgoing and balanced. ‘Thirteen’ is withdrawn and inwardized. ‘Fourteen,’ expansive and exuberant. ‘Fifteen,’ restless and apathetic. ‘Sixteen,’ friendly and well-adjusted.” Arnold Gesell et al., *Youth: The Years from Ten to Sixteen* 331 (1956). Such are the possible vacillations in temperament as adolescence approaches.

F. Adolescence [§ 2.10]

Most experts agree the human brain is not fully mature until age 25. *See, e.g.,* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 *Neuropsychiatric Disease & Treatment* 449, 451–52 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/pdf/ndt-9-449.pdf>; Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 *J. of Adolescent Health* 216 (2009), [https://www.jahonline.org/article/S1054-139X\(09\)00251-1/pdf](https://www.jahonline.org/article/S1054-139X(09)00251-1/pdf); Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 *Nature Neurosci.* 309 (2003), <https://www.nature.com/articles/nn1008> (available for a fee). Brain imaging studies show that the brain's frontal lobes and the prefrontal cortex (most associated with impulse control, risk assessment, and moral meaning) are the last brain regions to mature. Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 *Proceedings of Nat'l Acad. Sci.* 8174, 8175, 8177 (2004); Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 *Psych. Sci. in Pub. Int.* 1, 9 (2006); Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 *Current Directions in Psych. Sci.* 55, 57 (2007).

Brain scans show that gray matter increases in later childhood, Suparna Choudhury et al., *Social Cognitive Development During Adolescence*, 1 *Soc. Cognitive & Affective Neurosci.* 165, 165–66 (2006); Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 *Brain & Cognition* 73, 74, 84–85 (2002) (subjects of study were 10 to 22 years old), and then gets pruned beyond adolescence, Naama Barnea-Goraly et al., *White Matter Development During Childhood and Adolescence: A Cross-Sectional Diffusion Tensor Imaging Study*, 15 *Cerebral Cortex* 1848, 1851 (2005); Choudhury et al., *supra*, at 165–66; Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *Nature Neurosci.* 861, 861 (1999); McGivern et al., *supra*, at 85. Myelination is the process that coats the brain's axons, helping to “increase the efficiency of information processing.” Steinberg, *supra*, at 57. Myelination continues into adulthood. Choudhury, *supra*, at 166; Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 *J. Am. Acad. of Child & Adolescent Psychiatry* 1012, 1014 (2001); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 *Nature Neurosci.* 859, 860 (1999); Arthur W. Toga et al., *Mapping Brain Maturation*, 29 *Trends in Neurosci.* 148, 149, 153 (2006); Thomas J. Whitford et al., *Brain Maturation in Adolescence: Concurrent Changes in Neuroanatomy and Neurophysiology*, 28 *Human Brain Mapping* 228, 234–35 (2007).

In adolescent brains, the frontal lobes are less active than in adult brains. K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 *Neurosci. & Biobehav. Revs.* 13, 18 (2000); Interview with Dr. Deborah Yurgelun-Todd, McLean Hosp., in Belmont, Mass., in *Frontline: Inside the Teenage Brain* (PBS television broadcast Jan. 31, 2002), <https://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html> [hereinafter Yurgelun-Todd]. Brain activity shifts to the frontal lobes as adolescents become adults. Rubia, *supra*, at 18; L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *Neurosci. & Biobehav. Revs.* 417, 440 (2000); Yurgelun-Todd, *supra*.

Why is adolescent brain development relevant to guardians ad litem? Guardians ad litem work with adolescents and their families. It is important to understand that adolescents—even early adolescents—often look like adults and, at times, may even act like adults, but their brains are not yet fully developed adult brains. Adolescents can distinguish right from wrong. They, however, “differ from adults in the subjective value[s] that they attach to various perceived consequences in the process of making choices.” Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 *Law & Hum. Behav.* 221, 233 (1995). They focus more on possible gains (such as short-term consequences) than on the potential for losses (like future consequences). *Id.* at 231. While recklessness is not necessarily a characteristic of all adolescents, adolescents have “increased accessibility to risk-taking opportunities

(e.g., adolescents drive and have less adult supervision).” Reyna & Farley, *supra*, at 8. “[O]lder adolescents bring a more developed brain, as well as greater social and emotional maturity, to risky situations.” *Id.* Researchers note “these changes [in the development of adolescents’ decision-making competence] have a profound effect on their ability to make consistently mature decisions.” Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psych. 257, 271 (2001).

The adolescence group consists of children between the ages of 15 and 18. Adolescents characteristically have developed the capacity for formal thought. Thornburg, *supra* § 2.9, at 18. While younger children use appearance or possessions to describe themselves, adolescents tend to use motives, beliefs, or interpersonal characteristics. Brinthaup & Lipka, *supra* § 2.7, at 3.

Peers take on ever-increasing importance as the adolescent gains greater independence from parental authority and seeks more privacy within the family. Family relationships are often emotionally charged, augmenting the significance of peers in the adolescent’s life. Peers also serve as the key point of reference as the adolescent develops a sense of sexual identity. Marilyn Stern et al., *Father Absence and Adolescent “Problem Behaviors”: Alcohol Consumption, Drug Use and Sexual Activity*, 19 Adolescence 301, 310–11 (1984) [hereinafter Stern, *Father Absence*].

Adolescents seem to view their parents as alternately powerful and weak, while the adolescents themselves vacillate between dependence and independence. During this period, the family can “provide the youngster with the opportunity to return to base, to replenish emotional supplies that have been depleted, to restore battered self-esteem, to regress briefly, to retreat temporarily, and finally to gather courage for the next venture into independence.” Judith S. Wallerstein & Joan Berlin Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* 82 (1980) [hereinafter Wallerstein & Kelly]. Adolescents are attempting to determine how they best fit into society. Salah-Din & Bollman, *supra* § 2.5, at 124. While adolescents are shifting their loyalties away from their families, their middle-aged parents often need to confirm *existing* loyalties—to their parents, their children, and their community. Helm Stierlin, *Separating Parents and Adolescents: A Perspective on Running Away, Schizophrenia, and Waywardness* 27 (1974).

Adolescent self-esteem and life satisfaction are strongly related to the quality of the adolescent’s family attachments. Armsden & Greenberg, *supra* § 2.5, at 19. Therefore, “it is important that the breaks and disruptions of attachment should come exclusively from his side and not be imposed on him by any form of abandonment or rejection on the psychological parents’ parts.” Goldstein et al., *Beyond*, *supra* § 2.5, at 34.

Because adolescence is an emotionally charged life period, adolescents with health problems can be in a tenuous position. “[M]ental disorders during adolescence may be more strongly associated with reduced [quality of life] during adulthood,” and adolescents with both “physical illness and mental disorder tend to experience a particularly large reduction in [quality of life] by adulthood.” Henian Chen et al., *Impact of Adolescent Mental Disorders and Physical Illness on Quality of Life 17 Years Later*, 160 Archives of Pediatrics & Adolescent Med. 93, 97 (2006).

The GAL’s duty is to represent the best interests of the adolescent, remembering that this person who may look like an adult does not yet have the fully formed thinking capabilities of an adult. It is important to “[i]dentify factors that move adolescents ... [toward] categorical avoidance of major risks until they are developmentally prepared to handle the consequences.” Reyna & Farley, *supra*, at 36. Some factors to consider are adolescents’ access to positive adult role models; effective supervision by adults; the adolescents’ involvement in structured activities (such as extracurricular activities, sports, community service, volunteer activities, and jobs); and activities pursued with friends. While “heightened risk taking during adolescence is likely to be normative, biologically driven, and, to some extent, inevitable,” Steinberg, *supra*, at 58, caring adults can help to modulate potential long-term damage that risk-taking can cause before adolescents are mature enough to make adult decisions for themselves.

G. The Total Picture [§ 2.11]

A child’s self-concept largely depends on home experiences and identification with one or both parents. Mussen et al., *supra* § 2.5, at 344. A positive sense of self is associated with a feeling of belonging, a perception of being loved by parents, and a desire to emulate parental qualities. There appear to be two prerequisites for establishing and maintaining strong parental identification: (1) perception by the child of similarities to the parent, and (2) qualities in the parent that are attractive to the child. *Id.* at 333.

In a relationship as close and long-lasting as that of a parent and child, the parent’s true feelings are usually evident to the child. Thomas Gordon, *Parent Effectiveness Training* 25 (1970) [hereinafter Gordon]. Although it may be good for a child to know a

parent's true feelings, there is often a great deal of emotion that goes along with that knowledge. Learning how to deal with (rather than avoid, ignore, or be ignorant of) the strong and sometimes irrational emotions that erupt between family members contributes to the normal growth of the child. Freud & Burlingham, *Infants*, *supra* § 2.5, at 61.

Some theorists propose that a child requires two parents to develop properly; a parent of the same sex becomes a role model, while a parent of the opposite sex serves as a love object. Neither role can be adequately filled by parents who have irreconcilable differences. Lidz, *supra* § 2.7, at 57. It seems that parental effectiveness, not the mere presence of two parents, is what has the greatest effect on child development:

In general, children prefer parents who work together and cooperate in their child-rearing activities. They dislike parents who are arbitrary and who will not listen to their side of the story. While children appreciate parents who set rules and limits, they do not care for parents who are overly strict or overly lenient. Children interpret such extreme behavior, and often rightly, as meaning that the parents do not care enough about them. They see it as a form of rejection.

Elkind, *supra* § 2.7, at 76.

A family as a whole also goes through developmental stages. Life transitions, “such as entering and leaving school, joining or leaving the labor force, migration, leaving or returning home, marriage and setting up an independent household,” Tamara Hareven, *Historical Changes in the Family and the Life Course: Implications for Child Development*, 50 Monographs of Soc’y for Res. in Child Dev. 8, 14 (1986), all affect the family as a whole in addition to the individuals who compose the family. Traumatic events necessitate that the family cope by drawing on its own strengths and resources, and possibly by seeking outside help. Poor family coping mechanisms can lead to outcomes such as family breakdown, delinquency, or violence. Caryl Bailey Germain, *Emerging Conceptions of Family Development Over the Life Course*, 75 Families in Soc’y 259, 264 (1994).

III. Domestic Violence, Abuse, and Neglect [§ 2.12]

Domestic violence occurs in many forms. It may be abuse of a spouse or partner, or abuse and neglect of children. Emotional abuse includes witnessing domestic abuse.

Note. Unless otherwise indicated in this chapter, the terms *domestic violence* and *domestic abuse* are used interchangeably to refer to conduct that may be physical or nonphysical in nature.

The effects of abuse and neglect on a child can last a lifetime and can alter normal development. As a rule, children gain increasing internal control over their behavior as they get older. However, individuals who have been abused or neglected may believe that their lives are controlled externally and may think that their life events are not contingent on their own actions.

Attachments developed in infancy influence people throughout life. For this reason, abused infants who form insecure attachments after experiencing neglect or abuse have an increased potential for emotional problems in later life. For example, abuse undermines children's self-esteem, and lowered self-esteem is associated with parental rejection. Bilha Davidson-Arad et al., *Short-Term Follow-up of Children at Risk: Comparison of the Quality of Life of Children Removed from Home and Children Remaining at Home*, 27 Child Abuse & Neglect 733, 735 (2003); Nancy L. Galambos & Roger A. Dixon, *Adolescent Abuse and the Development of Personal Sense of Control*, 8 Child Abuse & Neglect, 285, 287 (1984) [hereinafter Galambos & Dixon]. Low self-esteem, anxiety, academic problems, and an external locus of control all contribute to the vicious circle in which the abused adolescent is trapped. Galambos & Dixon, *supra*, at 288. Any type of maltreatment, including emotional abuse, also can lead to significantly higher levels of substance use for adolescents. Patricia B. Moran et al., *Associations Between Types of Maltreatment and Substance Use During Adolescence*, 28 Child Abuse & Neglect 565, 573 (2004).

Adults who abuse and neglect their children cut across all social strata. There are, however, some commonalities among them. Parents who begin the abuse when their children are young are more often separated, divorced, or single than parents who first abuse their children when their children reach adolescence. Galambos & Dixon, *supra*, at 286. Abused children are also likely to come from families in which the father is the dominant family member. Rejected children, on the other hand, are more likely to have aggressive parents with low expectations for the children's behavior. Further, neglected children are less likely than abused children to live in homes in which there is parental conflict. Joan McCord, *A Forty-Year Perspective on Effects of Child Abuse and Neglect*, 7 Child Abuse & Neglect 265, 268 (1983). Children with disabilities are more likely to be maltreated—neglected and physically, emotionally,

or sexually abused—than non-disabled children. Kathleen Kendall-Tackett et al., *Why Child Maltreatment Researchers Should Include Children's Disability Status in Their Maltreatment Studies*, 29 Child Abuse & Neglect 147, 148 (2005).

IV. Sexual Abuse of Children [§ 2.13]

Guardians ad litem appointed to protect the interest of children need to consider the possibility of sexual abuse. It is important to keep in mind that the prevalence of sexual abuse of children is hard to gauge because sexual abuse of children often is not reported at the time it occurs. Although many children report sexual abuse in a timely manner, many children delay such reports. Quincy C. Miller & Kamala London, *Forensic Implications of Delayed Reports from Child Witnesses, in Memory and Sexual Misconduct: Psychological Research for Criminal Justice* ch. 5 (Joanna Pozzulo et al. eds., 2020).

Sexual abuse of children includes sexual contact or sexual intercourse with a child without consent or with a child who is legally incapable of giving consent; or any sexual activity involving a child, such as engaging in child enticement, soliciting a child for prostitution, incest, exposing a child to harmful material, exposing genitals to a child, the manufacture of child pornography, or perpetrating any acts of a sexual nature involving a child.

Perpetrators obtain compliance from child victims in a variety of ways. Some offenders will “groom” the child by gradually sexualizing the relationship with the child over time, *see* Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 Child Abuse & Neglect 29, 37 (1990), encouraging the child to see the relationship as mutual, and providing the child with gifts or special attention. “Repeat offenders generally calculate and plan their approach to victimizing children, often employing elaborate strategies to involve the children, maintain their cooperation, and prevent reporting.” Lucy Berliner & Diana M. Elliott, *Sexual Abuse of Children, in The APSAC Handbook of Child Maltreatment* 58 (John E.B. Myers et al. eds., 2d ed. 2002) [hereinafter Berliner & Elliott].

Some perpetrators use force or threats of force or injury to obtain compliance. Beverly Gomes-Schwartz et al., *Child Sexual Abuse: The Initial Effects* 60–61 (1990); Diana M. Elliott & John Briere, *Forensic Sexual Abuse Evaluations of Older Children: Disclosures and Symptomatology*, 12 Behav. Sci. & L. 261, 268 (1994); Benjamin E. Saunders et al., *Prevalence, Case Characteristics, and Long-Term Psychological Correlates of Child Rape Among Women: A National Survey*, 4 Child Maltreatment: J. of Am. Pro. Soc’y on Abuse of Child. 187, 189–90 (1999).

Most sexual abuse reports come to light through sources other than the child’s self-disclosure. When children voluntarily disclose, they are most likely to tell a parent, usually their mother. Maria Sauzier, *Disclosure of Child Sexual Abuse: For Better or Worse*, 12 Psychiatric Clinics of N. Am. 455, 458, 460 (1989). More recent research has demonstrated that the ways in which parents, particularly mothers, interact with young children significantly affect the accuracy of the children’s memory and event reports. Gabrielle F. Principe & Kamala London, *How Parents Can Shape What Children Remember: Implications for the Testimony of Young Witnesses*, 11(3) J. of Applied Rsch. in Memory & Cognition 289 (2022). Paradoxically, mothers instructed to elicit accurate information instead of just using their normal conversational style obtained less accurate event reports from their children. When assessing abuse accusations, guardians ad litem should be aware of the ease with which the memories of young children can be inadvertently affected by discussions with their mother. Principe and London identified this as “the single most important challenge facing contemporary investigations of child sexual abuse.” *Id.* at 290.

Many children who are abused initially deny the abuse. Other children will recant after a disclosure. April R. Bradley & James M. Wood, *How Do Children Tell? The Disclosure Process in Child Sexual Abuse*, 20 Child Abuse & Neglect 881, 887–89 (1996); Irit Hershkowitz et al., *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents*, 31 Child Abuse & Neglect 111, 120–21 (2007); Kamala London et al., *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers*, 16 Memory 29, 31–44 (2008); Lindsay C. Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. of Child & Adolescent Psychiatry 162, 166–69 (2007); Rickard L. Sjöberg & Frank Lindblad, *Limited Disclosure of Sexual Abuse in Children Whose Experiences Were Documented by Videotape*, 159 Am. J. Psychiatry 312, 313–14 (2002); Karen M. Staller & Debra Nelson-Gardell, *“A Burden in Your Heart”: Lessons of Disclosure from Female Preadolescent and Adolescent Survivors of Sexual Abuse*, 29 Child Abuse & Neglect 1415, 1426–30 (2005). *See also generally* Steven J. Collings et al., *Patterns of Disclosure in Child Sexual Abuse*, 35 S. Afr. J. of Psych. 270, 278–82 (2005); Irit Hershkowitz, *Delayed Disclosure of Alleged Child Abuse Victims in Israel*, 76 Am. J. of Orthopsychiatry 444, 448 (2006). For example, in one study, only 43% of children with a sexually transmitted disease acknowledged sexual contact in their initial interviews. Louanne Lawson & Mark Chaffin, *False Negatives in Sexual Abuse Disclosure Interviews:*

Incidence and Influence of Caretaker's Belief in Abuse in Cases of Accidental Abuse Discovery by Diagnosis of STD, 7 J. of Interpersonal Violence 532, 537 (1992). "Children are thought to recant either because they have been subjected to pressure from the offender or family members or because their report has produced negative consequences to themselves or others." Berliner & Elliot, *supra*, at 59.

Children who are sexually abused display higher levels of emotional distress and dysfunction, post-trauma symptoms, behavioral problems, interpersonal difficulties, and cognitive difficulties and distortions than non-abused children. Sexually abused children show increased levels of depressive symptoms, higher anxiety, and lower self-esteem. Sue Boney-McCoy & David Finkelhor, *Psychosocial Sequelae of Violent Victimization in a National Youth Sample*, 63 J. of Consulting & Clinical Psych. 726 (1995); Christine A. Gidycz & Mary P. Koss, *The Impact of Adolescent Sexual Victimization: Standardized Measures of Anxiety, Depression, and Behavioral Deviancy*, 4 Violence & Victims 139 (1989); Anthony P. Mannarino & Judith A. Cohen, *Abuse-Related Attributions and Perceptions, General Attributions, and Locus of Control in Sexually Abused Girls*, 11 J. of Interpersonal Violence 162, 169–78 (1996) [hereinafter Mannarino & Cohen, *Abuse-Related Attributions*]; Anthony P. Mannarino & Judith A. Cohen, *A Follow-up Study of Factors That Mediate the Development of Psychological Symptomatology in Sexually Abused Girls*, 1 Child Maltreatment 246, 251–60 (1996) [hereinafter Mannarino & Cohen, *A Follow-up Study*]; Susan V. McLeer et al., *Psychopathology in Non-clinically Referred Sexually Abused Children*, 37 J. of Am. Acad. of Child & Adolescent Psychiatry 1326 (1998); Ron Roberts et al., *The Effects of Child Sexual Abuse in Later Family Life; Mental Health, Parenting and Adjustment of Offspring*, 28 Child Abuse & Neglect 525, 526 (2004) [hereinafter Roberts et al.]; Anne E. Stern et al., *Self Esteem, Depression, Behaviour and Family Functioning in Sexually Abused Children*, 36 J. of Child Psych. & Psychiatry & Allied Disciplines 1077 (1995) [hereinafter Stern, *Self Esteem*]. Such children also tend to experience higher levels of suicidal behavior than non-abused children. Cheryl Lanktree et al., *Incidence and Impact of Sexual Abuse in a Child Outpatient Sample: The Role of Direct Inquiry*, 15 Child Abuse & Neglect 447, 450, 452 (1991); Graham Martin et al., *Sexual Abuse and Suicidality: Gender Differences in a Large Community Sample of Adolescents*, 28 Child Abuse & Neglect 491, 492 (2004); R. Kim Oates, *Sexual Abuse and Suicidal Behavior*, 28 Child Abuse & Neglect 487, 488 (2004); Roberts et al., *supra*, at 526; Sharon M. Valente, *Sexual Abuse of Boys*, 18 J. of Child & Adolescent Psychiatric Nursing 10, 14 (2005).

Sexually abused children are more likely to be diagnosed with post-traumatic stress syndrome. Esther Deblinger et al., *Post-traumatic Stress in Sexually Abused, Physically Abused, and Nonabused Children*, 13 Child Abuse & Neglect 403 (1989); Allison E. Dubner & Robert W. Motta, *Sexually and Physically Abused Foster Care Children and Posttraumatic Stress Disorder*, 67 J. of Consulting & Clinical Psych. 367 (1999); Roberts et al., *supra*, at 526. Sexually abused children are more likely than non-abused children to run away from home, use drugs and alcohol, be bulimic, *see* Roberta A. Hibbard et al., *Behavioral Risk, Emotional Risk, and Child Abuse Among Adolescents in a Nonclinical Setting*, 86 Pediatrics 896 (1990), have trouble at home, and show increased sexual behavior. In younger children, this could manifest in mimicking sexual acts. William N. Friedrich et al., *Child Sexual Behavior Inventory: Normative, Psychiatric and Sexual Abuse Comparisons*, 6 Child Maltreatment 37 (2001). For older girls, this could lead to hypersexual behavior, and for older boys it may include genital exposure or sexual coercion. Julie Adams et al., *Sexually Inappropriate Behaviors in Seriously Mentally Ill Children and Adolescents*, 19 Child Abuse & Neglect 555 (1995).

Sexually abused children experience these symptoms to different extents. Some factors found to affect the extent to which sexually abused children display symptoms include intensity of abuse, severity of abuse (e.g., penetration, use of force), and duration of abuse. Lynne Briggs & Peter R. Joyce, *What Determines Posttraumatic Stress Disorder Symptomatology for Survivors of Childhood Sexual Abuse?*, 21 Child Abuse & Neglect 575 (1997); Anderson B. Rowan et al., *Post-traumatic Stress Disorder in a Clinical Sample of Adults Sexually Abused As Children*, 18 Child Abuse & Neglect 51 (1994); Kenneth J. Ruggiero et al., *Sexual Abuse Characteristics Associated with Survivor Psychopathology*, 24 Child Abuse & Neglect 951, 958, 960–61 (2000) [hereinafter Ruggiero et al.]; Benjamin E. Saunders et al., *Child Sexual Assault as a Risk Factor for Mental Disorders Among Women: A Community Survey*, 7 J. of Interpersonal Violence 189, 201 (1992); Stern, *Self Esteem*, *supra*, at 1085; David A. Wolfe et al., *Factors Associated with the Development of Posttraumatic Stress Disorder Among Child Victims of Sexual Abuse*, 18 Child Abuse & Neglect 37 (1994) [hereinafter Wolfe]. The victim's relationship with the abuser may be another relevant factor, because the abuse may cause a greater impact the closer the relationship is with the offender. Ruggiero et al., *supra*, at 961; Jennifer Tebbutt et al., *Five Years After Child Sexual Abuse: Persisting Dysfunction and Problems of Prediction*, 36 J. of Am. Acad. of Child & Adolescent Psychiatry 330 (1997) [hereinafter Tebbutt et al.]; Wolfe, *supra*, at 46.

Other factors that may affect a victim's symptoms include the level of coercion involved and the extent to which the abuse affected the family. Steve Spaccarelli, *Measuring Abuse Stress and Negative Cognitive Appraisals in Child Sexual Abuse: Validity Data on Two New Scales*, 23 J. of Abnormal Child Psych. 703 (1995). In the context of incest, child abuse may exacerbate symptoms already caused by family dysfunction, and new symptoms may be attributable to the abuse. Jean-Pierre Hotte & Sandra Rafman, *The Specific Effects of Incest on Prepubertal Girls from Dysfunctional Families*, 16 Child Abuse & Neglect 273 (1992).

Roland Summit, a psychiatrist who consulted with professionals in cases of alleged child sexual abuse and who noted inconsistent behaviors of children who had been sexually abused, developed the concept of child sexual abuse accommodation syndrome (CSAAS) in the late 1970s and early 1980s. Summit argued that it was typical for abused children to keep their abuse a secret, delay or provide incomplete disclosures, and subsequently retract their claims. He said that the more illogical and incredible the child's disclosures were, the more likely they were to be true, and he also reported that children "never fabricate" the details of the reported sexual abuse. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177, 191 (1983). The five stages in Summit's CSAAS were secrecy, helplessness, entrapment and accommodation, delayed disclosure, and retraction.

After the development of the concept of CSAAS, the concept was offered in child abuse prosecutions as a potential theory to support the contention that when an alleged victim is inconsistent, the alleged victim nevertheless might be truthful. But, as time went on, other researchers questioned whether CSAAS was truly a syndrome and raised other criticisms. In 1992, Summit published a second paper, taking both the prosecution and the defense bars to task for their misuse of his 1983 paper. Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 *J. of Child Sexual Abuse* 153 (1992). Since then, a more prevalent view has emerged that acknowledges that although some children who have been sexually abused do evidence a variety of problematic behaviors and concerns, there is no set of symptoms or pattern of behavior that universally occurs in cases of child sexual abuse. *See, e.g.,* Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 *Psych. Bull.* 164 (1993).

While some children who experience serious abuse show remarkable resiliency, others will experience symptoms throughout life. Later normal functioning of a sexually abused child is increased when a non-offending parent believes and supports the child. Jon R. Conte & John R. Schuerman, *Factors Associated with an Increased Impact of Child Sexual Abuse*, 11 *Child Abuse & Neglect* 201, 209 (1987); Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*, 59 *Am. J. of Orthopsychiatry* 197, 204–06 (1989); William N. Friedrich et al., *Children from Sexually Abusive Families: A Behavioral Comparison*, 2 *J. of Interpersonal Violence* 391 (1987); Mannarino & Cohen, *Abuse-Related Attributions*, *supra*, at 178; Mannarino & Cohen, *A Follow-up Study*, *supra*, at 257–60; Tebbutt et al., *supra*, at 331, 335–36; Tiffany W. Wind & Louise E. Silvern, *Type and Extent of Child Abuse as Predictors of Adult Functioning*, 7 *J. of Fam. Violence* 261 (1992). Other protective factors include a supportive relationship with adults outside the home and involvement in extracurricular activities. "Positive experiences in school may be especially important if adolescents experience adversity at home...." Daniel F. Perkins & Kenneth R. Jones, *Risk Behaviors and Resiliency Within Physically Abused Adolescents*, 28 *Child Abuse & Neglect* 547, 549 (2004).

V. Alternative Care and Termination of Parental Rights [§ 2.14]

Alternative care, such as foster care, placement with relatives, and adoption, can provide children with a stable environment and a chance to develop healthy relationships within that environment. During alternative placement, caseworkers are able to help clarify the parental role, work with the family to establish appropriate relationships, and allow the child to witness important interactions between their parents and authority figures. J.R. Wilkes, *Children in Limbo: Working for the Best Outcome When Children Are Taken into Care*, Canada's Mental Health, June 1992, at 2, 4–5 [hereinafter Wilkes], such as attorneys, social workers, court personnel, and judges. It is possible for parents with intellectual disabilities to be competent parents if a support plan is established to help them learn to parent appropriately. Maurice A. Feldman, *Preventing Child Neglect: Child-Care Training for Parents with Intellectual Disabilities*, *Infants & Young Child*, Oct. 1998, at 1, 2. The support plan could include ongoing help from social workers, the guardian ad litem, family court counseling, and other services as necessary. It is important to obtain comprehensive physical, developmental, and mental-health screenings for the child as part of placement planning, to ensure that the child's needs are being met. Laurel K. Leslie et al., *The Physical, Developmental, and Mental Health Needs of Young Children in Child Welfare by Initial Placement Type*, 26 *J. of Developmental & Behav. Pediatrics* 177 (2005). Inclusion of the parents in permanency planning should be a priority. When such inclusion is impossible, helping children to establish a connection to their roots can be enhanced by visits to the old neighborhood, books about their family members' lives or scrapbook remembrances from their own life, and historical information. Salahu-Din & Bollman, *supra* § 2.5, at 134.

The initial negative effects of separation from the family can be reduced and even counteracted through placement in a stable foster home. Anthony N. Maluccio & Edith Fein, *Growing up in Foster Care*, 7 *Child. & Youth Servs. Rev.* 123, 131 (1985). There are concerns about whether a child will bond to adults to develop properly, but it is possible for children to "bond with caretakers even absent a biological link." Phyllis Coleman, *A Proposal for Terminating Parental Rights: "Spare the Parent, Spoil the Child,"* 7 *Am. J. of Fam. L.* 123, 128 (1993) [hereinafter Coleman]. Contact with the child's original family provides the opportunity for a feeling of continuity and connectedness. Children who do well in foster care are those who have a sense of unconditional attachment

to a person, allowing them to profit from additional relationships. Salah-Din & Bollman, *supra* § 2.5, at 125. They recognize that “not every parent can be a daily caregiver” and that a parent and child “can maintain kinship bonds even though they may not be able to live together.” James K. Whittaker & Anthony N. Maluccio, *Rethinking “Child Placement”: A Reflective Essay*, 76 Soc. Serv. Rev. 108, 121 (2002).

When there is a disruption in foster placement causing the child to be removed from the foster home, the child experiences this as a rejection. This separation ends social relationships and living arrangements that the child has established. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 Fam. Ct. Rev. 540, 543 (2004); K. Proch & M.A. Taber, *Placement Disruption: A Review of Research*, 7 Child. & Youth Servs. Rev. 309 (1985). A series of foster placement disruptions, creating a sense of being in prolonged limbo, can be very damaging to the child’s development. It is not unusual for children who feel like they are in limbo to become withdrawn, depressed, self-accusatory, hostile, and permanently detached with low self-concepts and antisocial or asocial behaviors. Wilkes, *supra*, at 2. Even their health care may be lacking. It is common for children in foster care not to receive any medical care in a given year, including a preventive annual physical. Gunnar Almgren & Maureen O. Marcenko, *Emergency Room Use Among a Foster Care Sample: The Influence of Placement History, Chronic Illness, Psychiatric Diagnosis, and Care Factors*, 1 Brief Treatment & Crisis Intervention 55, 63 (2001). “Multiple placements and episodic foster care both increase[] the ... probability of high mental health service use.” *For Foster Children, Unstable Placements Have Higher Health Care Costs*, Biotech Week, May 26, 2004, at 145.

Placement with relatives, known as kinship care, is an additional alternative to consider. Most children not residing with their parents live in a kinship arrangement, whether it is a formal placement or an informal plan. Yongmin Sun, *The Well-Being of Adolescents in Households with No Biological Parents*, 65 J. of Marriage & Fam. 894, 895 (2003). Relatives can provide a familiar and secure living arrangement. However, those placing the children should exercise caution not to overburden relatives, especially if the intent is to save money. Children in kinship care often experience inadequate efforts to rehabilitate the biological family. Joyce E. Everett, *Relative Foster Care: An Emerging Trend in Foster Care Placement Policy and Practice*, 65 Smith Coll. Stud. in Soc. Work 239, 240 (June 1995) [hereinafter Everett, *Relative Foster Care*]; see also Jim Henry, *Permanency Outcomes in Legal Guardianships of Abused/Neglected Children*, 80 Fams. in Soc’y 561 (1999). Thus, kinship placements seldom result in a permanent placement resolution because, without changes in the biological family, return to the biological family occurs less frequently. “[A]doption is an even less likely outcome,” Everett, *Relative Foster Care*, *supra*, at 251, when there is extended family involvement such as kinship placement.

The Wisconsin Legislature modified the concept of kinship care by enacting 2023 Wis. Act 119, which allows for out-of-home placement of a child with a person who is “like-kin” and further allows for such an individual to receive kinship care payments when caring for a child. A person who is “like-kin” means

an individual who has a significant emotional relationship with a child or the child’s family that is similar to a familial relationship and who is not and has not previously been the child’s licensed foster parent. For an Indian child, “like-kin” includes individuals identified by the child’s tribe according to tribal tradition, custom or resolution, code, or law.

[Wis. Stat.](#) § 48.02(12c). This legislation adds persons, including more distant relatives, to the list of those eligible for both out-of-home placement of a child as well as kinship care payments for such placements, see, e.g., [Wis. Stat.](#) § 48.02(15) (defining “relative”), thereby expanding the out-of-home placement options available for some youth. It also defines “like-kin” for an Indian child as an individual identified by the child’s tribe as kin or like-kin according to tribal tradition, custom or resolution, code, or law. [Wis. Stat.](#) § 48.02(12c).

Note. 2023 Wis. Act 119 becomes effective on July 1, 2025, or earlier if the Department of Children and Families publishes a notice in the Wisconsin Administrative Register specifying the date the department determines there is sufficient funding allocated to fund the expansion of the kinship care programs under the act.

Residential treatment is another alternative to foster care. It can provide a respite after a series of foster placements, serving as a neutral environment in which future planning can occur. Attachments can be formed in preparation for future attachments, and the sense of belonging can be carried forward to a new family situation. Some residential facilities also provide follow-up services to ease future transitions in care. Douglas Powers & John Powell, *A Role for Residential Treatment in Preparation for Adoption, in Adoption for Troubled Children: Preparation and Repair of Adoptive Failures Through Residential Treatment* 32 (Douglas Powers, ed., 1984).

In the end, intervention by an agency to protect children from a harmful or potentially harmful situation is designed to keep families together. Out-of-home placement is generally regarded as less desirable. Lucy Berliner, *Is Family Preservation in the Best Interest of Children?*, 8 J. of Interpersonal Violence 556 (Dec. 1993). When alternative placement is used, it is often seen as an interim step in reuniting the family. Sometimes, however, reunification is impossible. When that happens, TPR ends the presumption that the child's parents will take responsibility for making decisions concerning the child's life and makes it possible for the child to be adopted by another family. This is a drastic step. However, "[w]ith some kinds of child maltreatment, one strike is sufficient to warrant terminating parental rights." Gelles, *supra* § 2.5, at 561. In fact, "[s]ometimes there is less difficulty if the termination of parental rights occurs without unnecessary delays, freeing the child for permanency planning." Linda Gullledge et al., *Critical Issues in the Daily Lives of Children During Residential Preparation for Adoption, in Adoption for Troubled Children: Preparation and Repair of Adoptive Failures Through Residential Treatment* 122 (Douglas Powers ed., 1984).

Delays in TPR to allow for possible reunification of the biological family may cause the biological family and child to experience numerous disruptions in care. Attempts to bond and rebond after attachments have been broken with several out-of-home placements are difficult at best. Thus, a quick TPR frees the child from the burden of trying to survive in an irreparable family situation and gives the child a chance to live permanently in a stable environment. However, assessment should be made of the parent-child relationship within the context of the child's experience. For example, noting that the child experiences distress after interacting with a parent is not enough to assume that the child has been traumatized by leaving a loved parent. It is possible that the distress may be caused by a change in routine or to a parent-child interaction that is so poor that the child reacts to the experience of merely being with the parent. An expert in family relationships and development may best be able to help evaluate the individual situation. Sandra T. Azar et al., *Child Maltreatment and Termination of Parental Rights: Can Behavioral Research Help Solomon?*, 26 Behav. Therapy 601 (1995). Expert testimony can be elicited from a professional who has knowledge of the profession as well as an understanding of the legal questions before the court.

The ultimate objective associated with TPR is adoption. That is, once the child's biological parents are stripped of their parental rights, the child may be adopted by another, hopefully more stable, family. However, younger children (especially those of preschool age) are more adoptable than older children because younger children adapt more easily to new situations. For this reason, some experts suggest that TPR be based on the needs and interests of the child rather than parental fitness, Coleman, *supra*, at 124–26, because the ability of parents to provide responsible care is not necessarily indicative that such care will be provided. Foster caretakers and therapists should be involved in the decision-making process. Robert Horowitz, *Tighten Standards for Termination of Parental Rights*, 18(3) Child. Today 9, 10 (1989).

One of the reasons why older children are less adoptable is that "the older child is [more] likely to have developed a stronger bond with his or her biological parent, making it more difficult to dissolve the relationship without trauma." Coleman, *supra*, at 126. Guilt, rejection, abandonment, loss, and anger are likely to result from separation from biological parents, and trust in new people is hard to establish when the older child sees the world as uncertain. Memories of conflicts within the biological family add to the difficulty in trusting others. Often an older child is not ready to fully commit to both adoptive parents, and the extended adoptive family is less likely to fully accept the older child as a family member. In addition, older children need to deal with typical issues of independence at the same time they are supposed to be developing attachments to their adoptive family. Norman Coyle & Ishbel Lyle, *The Risks in Adoption, in Adoption for Troubled Children: Prevention and Repair of Adoptive Failures Through Residential Treatment* 18–23 (Douglas Powers, ed., 1984).

One option that may make adoption smoother is adoption by foster parents. This process gives full recognition to a family unit that already exists, Coleman, *supra*, at 127, and avoids forcing the child to break existing bonds and create new ones.

If a TPR is being considered merely on the ground of the length of time out of custody and the parent's behavior has not been abusive or neglectful, alternatives such as kinship care or long-term foster care may be more appropriate so that parental contact may be maintained. Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. Rev. 1251, 1272–73 (1996). It must be remembered that TPR severs relationships with all family members, extended family included. There may be situations

where an ongoing relationship with the extended family may be very important in ensuring continuity with the child's ethnic, religious, cultural and linguistic background. The involvement of the extended family may provide continuity and promote the preservation of a child's identity in a way which is less likely to be achieved if the child is adopted.

Patrick Parkinson, Child Protection, Permanency Planning and Children's Right to Family Life, 17 Int'l J.L. Pol'y & Fam. 147, 158 (2003).

VI. Divorce [§ 2.15]

A. Overview [§ 2.16]

When parents separate, children are forced to make several adjustments in their lives. The first 18 months of parental separation are crucial for children's adjustment at home and at school. Jane Schwertfeger, *Research Concerning Young Children of Divorced Parents and Recommendations for Teachers* 24 (1983). Divorce changes the form of family relationships, Constance R. Ahrons, *Redefining the Divorced Family: A Conceptual Framework*, 25 Soc. Work 437 (1980) [hereinafter Ahrons, *Redefining*], and requires a renegotiation of the family structure and roles. Constance R. Ahrons, *The Continuing Coparental Relationship Between Divorced Spouses*, 51 Am. J. of Orthopsychiatry 415, 425 (1981).

The effects of divorce on children vary with their age and developmental level and with individual circumstances, such as the quality of the parent-child relationship, family dynamics, and parental conflict. Marsha Kline Pruett et al., *Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children*, 17 J. of Fam. Psych. 169 (2003). Some characteristics associated with divorce, such as feelings of insecurity and a lack of trust in adults, can be found in all age groups. Rowling, *supra* § 2.8, at 4. Divorce can give children feelings of fright (about who will care for them, money, their relationships with their parents), sadness, yearning for the absent parent, worry (about the absent parent, about the parents' new relationships), rejection, loneliness, conflicted loyalties, anger, and guilt. Wallerstein & Kelly, *supra* § 2.10, at 45–50. These reactions to divorce can interfere with normal development. Donald N. Duquette, *Mental Health Professionals and Child Custody Disputes: Are There Alternatives to the Adversarial Process?*, 2 Infant Mental Health J. 159, 160 (1981) [hereinafter Duquette]; Virginia H. Luftman et al., *Practice Guidelines in Child Custody Evaluations for Licensed Clinical Social Workers*, 33 Clinical Soc. Work J. 327, 328 (2005) [hereinafter Luftman et al.]. Sometimes, these problems are not evident at the time of divorce but can surface later in life after becoming more intense. Florence Bienenfeld, *Child Custody Mediation* 21 (1983) [hereinafter Bienenfeld, *Child*].

Theorists have identified five stages through which children progress in dealing with the realities of divorce. While a stage and its accompanying behaviors may overlap with others, one stage tends to predominate at any one time. In the first stage, the child denies that the divorce is occurring. Next, the child experiences anger, often directing it not only at either or both parents but also at others. Bargaining is the third stage; the child may attempt to be unrealistically helpful, comforting, and pleasing to the parents as the child copes with a misguided sense of guilt based on the assumption that the child caused one of the parents to leave. Depression comes next, with accompanying excessive clinginess and over-conscientiousness. Coming to terms, the last stage, may take anywhere from 12 months to 4 years or more. Shelley Phillips, *The Child in the Divorcing Family* 5 (1982) (Kensington, Austl.: N.S.W. Univ. Sch. of Educ. Selected Papers No. 22) [hereinafter Phillips].

It is also important to examine what the family situation was like before the divorce because the pre-separation period may have been stressful even though the family was still intact. Andrea L. Morrison et al., *A Prospective Study of Divorce and Its Relationship to Family Functioning* 10 (paper presented at the biennial meeting of the Society for Research in Child Development, Detroit, Mich., Apr. 21–24, 1983). If the individual circumstances include a history of family violence, the effects of divorce should not be underestimated. “Parental conflict may impact children ... by causing emotional distress in children subjected to their parents' fighting....” Lynn S. Zubernis et al., *Prevention of Depressive Symptoms in Preadolescent Children of Divorce*, 30(1/2) J. of Divorce & Remarriage 11, 14 (1999) [hereinafter Zubernis et al.]. High levels of child depression may also result from “parents' involvement of the child in the dispute, role reversals such as children taking care of or comforting a distressed parent, or children being used as messengers between parents....” *Id.* Parents in conflict provide negative role models of conflict resolution. Children caught in the middle of such conflicts sometimes fear abandonment by one or both parents if they express positive feelings about a parent. Withdrawal can become their maladaptive coping style. *Id.* at 14–15.

Children's adjustment to divorce depends on important family process variables. These include conflict between the parents, the quality of the child's relationship with each parent, child-rearing practices, and the loss of family income. Daniel S. Shaw, *The Effects of Divorce on Children's Adjustment: Review and Implications*, 15 Behav. Modification 456, 476 (1991) [hereinafter Shaw]. Children can adjust well “when they have a secure and close relationship with both parents,” Robert Adler, *Sharing the Children: How to Resolve Custody Problems and Get on with Your Life* 7 (1988) [hereinafter Adler], “when they are protected from their parents' conflicts, when parents handle their own conflicts well,” *id.* at 9, and “when their parents find ways to maintain their own personal

well-being,” *id.* at 11. Parental adjustment to divorce can be stressful. “Depression and stress can significantly reduce the parent’s energy level, increase irritability, and distract parents from children’s concerns.” Zubernis et al., *supra*, at 13; *see also* Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 6 J. of Marriage & Fam. 1269 (Nov. 2000), https://www.jstor.org/stable/1566735?&seq=1#page_scan_tab_contents (available for a fee); Kline Pruett et al., *supra*.

B. Effects on Infants [§ 2.17]

Because infants respond primarily at the emotional level, they may be attuned to the moods of caregivers who are experiencing the anger, anxiety, and depression typically associated with separation and divorce. Infants may be aware of these feelings, Rowling, *supra* § 2.8, at 12, because they are sensitive to the consistency and adequacy of their care. Adler, *supra* § 2.16, at 98. An infant who is aware of a caregiver’s anger, anxiety, or depression may lack a sense of well-being, and thus, in some cases, fail to develop a secure attachment with a caregiver. Phillips, *supra* § 2.16, at 8.

Because raising a child alone is taxing, it is important for the parent to be aware of how the parent’s mood may affect the infant. The demands of an infant—often burdensome in the best of circumstances—can become overwhelming for the single parent. Brazelton, *Infants*, *supra* § 2.5, at xxvi. Quality infant care requires putting the child’s needs first—“a difficult assignment under the emotional stress of divorce.” *Id.* at xxvi–xxvii.

Over the past several decades, the importance of infant mental health has been increasingly recognized. Established in 2001, the Wisconsin Alliance for Infant Mental Health provides information and services to assist infants, young children, and their families. This group supports a statewide network of professionals and other individuals available to provide information and support in this area. Additional information can be found at <https://wiaimh.org/> (last visited Oct. 12, 2024).

C. Effects on Young Children [§ 2.18]

Divorce may have significant effects on children between the ages of three and five because the egocentrism associated with young children prevents them from viewing the divorce from any perspective but their own. Rowling, *supra* § 2.8, at 12. This egocentrism not only restricts children’s cognitive and social skills but also distorts their perceptions of their parents’ emotions and behavior. In addition, it often causes the children to blame themselves for the divorce. E.M. Hetherington et al., *Cognitive Performance, School Behavior, and Achievement of Children from One-Parent Households* 9 (1981) [hereinafter Hetherington et al., *Cognitive*]. This age group is frequently viewed as the most vulnerable of all children because their level of thinking does not allow them to understand personal relationships. Phillips, *supra* § 2.16, at 8.

Young children of divorcing parents may experience nightmares, depression, eating problems, bedwetting, or other regressive behaviors. *Id.* at 9; Adler, *supra* § 2.16, at 98; Jack Arbuthnot & Donald A. Gordon, *What About the Children: A Guide for Divorced and Divorcing Parents* 5 (3d ed. 1996) [hereinafter Arbuthnot & Gordon]. Their play may become less imaginative, cooperative, or constructive. Phillips, *supra* § 2.16, at 9. They may throw tantrums or seem clingy, moody, and whiny. Fears of separation or macabre fantasies may come to the surface. Aggressive or destructive behavior may also increase, especially among young boys. Hetherington et al., *Cognitive*, *supra*, at 10; Parents Without Partners, *Reading Lists on Separation, Divorce and Single Parenting* 9 (1983) [hereinafter *Reading Lists*]; Wallerstein & Kelly, *supra* § 2.10, at 55–64.

The youngest children are most vulnerable to parental disturbance. Although acute depression in a parent is difficult for children of all ages, older children are often able to distance themselves from the troubled parent. Wallerstein & Kelly, *supra* § 2.10, at 118. To develop normally, children require security; and their development may become stunted if they are called on to support their parents emotionally. Lidz, *supra* § 2.7, at 57.

D. Effects on Early School-Aged Children [§ 2.19]

In children between the ages of four and nine, problems associated with divorce are often manifested in school. Teachers are often first to notice behavior changes resulting from anxiety about changes at home. *Reading Lists*, *supra* § 2.18, at 9. There may be a marked deterioration in the children’s performance at school. The grief that early school-aged children feel when their parents divorce can be intense because children of this age tend to be conscious of sorrow. They may develop fears leading to disorganized behavior and panic, or they may feel deprived (of food, toys, etc.). They may yearn for the departed parent, suppressing feelings of aggression toward the father, for example, while expressing anger at the custodial mother. An apparent sense of responsibility to take care of the

parents is also common. Arbuthnot & Gordon, *supra* § 2.18, at 5. Most children experience loyalty conflicts, Wallerstein & Kelly, *supra* § 2.10, at 65–71; Phillips, *supra* § 2.16, at 9, often becoming anxious, fearful, moody, and more aggressive. Adler, *supra* § 2.16, at 99. It is distressing for them to adjust to the reality “that one of their parents ... is no longer part of their daily lives.” *Id.*; R. Neugebauer, *Divorce, Custody, and Visitation: The Child’s Point of View*, 12(2/3) J. of Divorce 153, 156 (1988–89) [hereinafter Neugebauer].

E. Effects on Older School Children [§ 2.20]

In response to divorce, older school children, from 9 to 16 years old, will often exhibit bravado in public to cover feelings of loss, rejection, helplessness, loneliness, anger, shaken identity, somatic symptoms, and alignment with one parent. Arbuthnot & Gordon, *supra* § 2.18, at 6; Wallerstein & Kelly, *supra* § 2.10, at 71–79. Older children are more likely than younger children to experience loyalty conflicts and may resent being caught in the middle of their parents’ battle. These children are harmed by ongoing criticism of one parent by the other parent and by their parents’ continuing arguments. Adler, *supra* § 2.16, at 99. Possessing more adequate defenses than their young siblings, older children may retreat into denial.

Older children’s increasing independence and involvement with peers often help to mitigate the stress of the divorce situation. *Reading Lists*, *supra* § 2.18, at 9. These children nevertheless may act out their emotions through increased aggression toward their peers and noncompliance with teachers. Shaw, *supra* § 2.16, at 476. “[N]onschool sources of stress often exacerbate school-related stress.” S.K. Karr & P.L. Johnson, *School Stress Reported by Children in Grades 4, 5, and 6*, 68 Psych. Rep. 427, 430 (1991).

F. Effects on Adolescents [§ 2.21]

Children between the ages of 15 and 18 have more freedom and ability than younger children to seek outside sources for help and support as they cope with a divorce. Linda B. Rudolph, *The Impact of the Divorce Process on the Family* 4 (paper presented at the annual meeting of the Southeastern Psych. Ass’n, Atlanta, Ga., Mar. 23–26, 1983) [hereinafter Rudolph]. They also have more control over their lives than do younger children. Rowling, *supra* § 2.8, at 13. However, by virtue of their age, adolescents may have been exposed to family conflict for long periods of time. Rudolph, *supra*, at 4. This, together with the fact that parents express their anger more openly in the presence of older children, Wallerstein & Kelly, *supra* § 2.10, at 38, puts the development of a positive adolescent identity at risk. Rowling, *supra* § 2.8, at 13. As one study has noted:

[A]s children develop the cognitive capacity for self-reflexive thinking and can simultaneously perceive the opposing views of their disputing parents, they become more vulnerable to acute loyalty conflicts. Moreover, their parents, perceiving them to be more mature, tend to expect the children’s support and ask them to take sides in the fight.

Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 Am. J. of Orthopsychiatry 576, 589 (1989).

The effects of divorce on adolescents manifest themselves in many ways. There may be changes in parent-child relationships, children may begin to worry about sex and marriage, and children may mourn the loss of the family and their childhood. It is also common for adolescents to experience anger and loyalty conflicts while they perceive their parents to be in a state of flux. This is also the age at which children achieve greater maturity and moral growth, more realistic views of money, and changed participation in the family. However, adolescents affected by divorce may resort to strategic withdrawal, detachment, and distance, while failing to cope with the pressures that go along with divorcing parents. These reactions often delay the child’s development as an adolescent, inducing pseudoadolescent behavior or regression because of the changed parental roles and demands on the child. Wallerstein & Kelly, *supra* § 2.10, at 80–83.

Adolescents’ responses to the stresses associated with significant changes in their natural support system may be reflected in their overt behavior, which often may take a deviant form. Specifically, these stresses may be manifested through activities that are generally encountered for the first time during adolescence, for example, alcohol consumption, drug use, and sexual activity.

Stern, *Father Absence*, *supra* § 2.10, at 302.

Adolescence is a time when children are expected to try new things with their parents united behind them as a safety net. Children of divorce may feel insecure and turn more to their peers when they really need the guidance of their parents. Zubernis et al., *supra* § 2.16, at 30. Long-term studies have shown that children of divorce may have more problems than offspring from continuously

married parents “in forming and maintaining happy and stable intimate relationships.” Paul R. Amato, *Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce*, 52 Fam. Rel. 332, 334 (2003).

As a result of their cognitive maturity and abstract thought process, adolescents are generally able to understand the divorce situation and can often feel some empathy for their parents. Because adolescents are better able to judge “who owns the problem,” they are less likely than their younger siblings to feel personally responsible. *Reading Lists, supra* § 2.18, at 9.

The closeness of the parent-child relationship, the amount of life change involved, the child’s previous experience of change and loss, and the adults’ attitude toward loss all play a role in an adolescent’s response to divorce. Rowling, *supra* § 2.8, at 12. Divorce may introduce awareness that parents have problems and are fallible. Frances M. Sessa & Laurence Steinberg, *Family Structure and the Development of Autonomy During Adolescence*, 11 J. of Early Adolescence 38, 44 (1991). Divorce may also make it difficult for a parent, particularly one who does not have primary physical placement, to maintain a healthy parent-child relationship. Therefore, to maintain a close relationship, the parent who does not have primary physical placement must have at least minimal contact with the adolescent child. This contact has been shown not to interfere with either the quality of primary parenting nor with the child’s relationship with the primary parent. Eleanor E. Maccoby et al., *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. of Fam. Psych. 24, 36 (1993). It is also important for the parent who has primary physical placement to monitor the adolescent, to remain involved in decisions about the adolescent child’s life, and to keep the adolescent from feeling caught in the middle. *Id.* A complicating factor is that the adolescent view of parents as old and sexless is often abruptly changed by divorce. Wallerstein & Kelly, *supra* § 2.10, at 83. For this reason, among others, it is often more difficult for adolescents to accept a stepparent than it is for a younger or grown child. Patricia Kain Knaub et al., *Strengths of Remarried Families*, 7(3) J. of Divorce 41, 52 (1984).

G. Differential Effects on Girls and Boys [§ 2.22]

There has been some study of the effects of divorce on both boys and girls. According to one study, “girls report more angry feelings and boys report more sad feelings.” Arbuthnot & Gordon, *supra* § 2.18, at 7.

Some studies have specifically evaluated the effect on children of an absent father, when children live with their mother after the parents’ divorce. The absence of a father from the home has been shown to have a greater impact on boys than on girls. Stern, *Father Absence, supra* § 2.10, at 309. Although boys especially need their fathers for sex role identification, both boys and girls have been found to suffer because of the absence of their father from the home. Adolescent children have been shown to perceive noncustodial and custodial fathers as functioning qualitatively in similar ways. Joyce A. Arditti, *Noncustodial Parents: Emergent Issues of Diversity and Process*, 20 Marriage & Fam. Rev. 283, 289 (1994).

When parents divorce and children live with their father, absence of the mother has been shown to damage the self-esteem of children because of their feelings of rejection by the mother. This is true whether this rejection is real or perceived. Girls also experience impairment of sex role identification when their mother is absent. Arbuthnot & Gordon, *supra* § 2.18, at 21. Girls who live with their mothers tend to have better psychological adjustment than those who live with their fathers. Mona J. Suleman & Steven A. Meyers, *Associations Between Custody Arrangements and Parent-Child Involvement Following Divorce*, 32(1/2) J. of Divorce & Remarriage 31, 33 (1999).

In some situations, children live primarily with one parent, having contact with the other parent on an occasional weekend or very rarely. If absent parent visits are fun-filled, with excursions or gifts, that parent can be seen by a child as the “Santa Claus” parent while the other parent must take on all the duties of being a full-time parent.

In current times, divorce is common, more so in some communities than others. How children feel about their family status can often be influenced by the community norm.

H. Custody [§ 2.23]

Note. The terminology used in sections H through J of this portion of the chapter outline reflects that used in Wisconsin law and not that used in most literature. Although the sources cited in these sections use the terminology differently (for example, what the literature refers to as *joint custody* is known as *shared physical placement* in Wisconsin), they mean the same thing.

1. In General [§ 2.24]

[Wis. Stat.](#) § 767.001(2)(a) defines *legal custody* as:

With respect to any person granted legal custody of a child, other than a county agency or a licensed child welfare agency under par. (b), the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

Thus, legal custody deals only with decision-making power and should not be confused with physical placement, which concerns the issue of how much time the child is going to spend with each parent. For a list of factors that a court must consider when determining legal custody, see [Wis. Stat.](#) § 767.41(5). For a discussion of these factors, see [chapter 3](#), *infra*.

Custody determinations have been affected dramatically because the gradual shift in societal sex-role expectations is having an impact on men's and women's orientation toward parenthood, thus producing "incongruent role perceptions and expectations for both spouses." Craig A. Everett & Sandra S. Volgy, *Family Assessment in Child Custody Disputes*, 9 J. of Marital & Fam. Therapy 343, 344 (1983). As one commentator has pointed out:

Social expectations continue to idealize motherhood for women while also encouraging participation in careers. At the same time, the father's participation in the earliest phases of child rearing is being encountered along with traditional expectations of being the "breadwinner" for the family. Thus, many women display high levels of ambivalence regarding their maternal role and when challenged in custody disputes become threatened by the possibility of giving up or even compromising that role's emotional meaning. ... In contrast, fathers are performing increasingly broader parenting roles with their children and are no longer willing to voluntarily give up their role.

Id.

It is imperative in making a fair custody decision to remember that marital unhappiness does not necessarily jeopardize effective parenting. Cultivating a special relationship with one or more children in the family can offset marital unhappiness. Wallerstein & Kelly, *supra* § [2.10](#), at 15. Thus, an assessment of an adult as a poor marriage partner does not necessarily mean that the same person is a bad parent. For that reason, among others, it is generally undesirable to grant exclusive legal custody to one parent. Such a determination "can be devastating to child and parent when both parents are indeed committed to a continuing relationship with their children." *Id.* at 311. Although parents who criticize each other can damage a child's development, Phillips, *supra* § [2.16](#), at 7, the sense of desertion, disruption, and loss is minimized when children and parents remain closely involved in co-parental arrangements. Bender, *supra* § [2.5](#), at 121; Garrison, *supra* § [2.8](#), at 79; Florence W. Kaslow, *Divorce Mediation and Its Emotional Impact on the Couple and Their Children*, 12 Am. J. of Fam. Therapy 58, 63 (1984) [hereinafter Kaslow].

2. Joint Custody [§ 2.25]

As defined by [Wis. Stat.](#) § 767.001(1s), *joint legal custody* means "the condition under which both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." Joint legal custody does not necessarily mean equal physical custody. Constance R. Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3(3) J. of Divorce 189, 201 (1980) [hereinafter Ahrons, *Joint*].

Successful joint custody demands maturity and energy on the part of both parents. Constance Stapleton & Norma MacCormack, *When Parents Divorce: Caring about Children* 7 (1981). The parents must be willing and able to reach agreement on child-rearing questions and to give the children's needs priority in making decisions about residence. Aaron N. Hoorvitz & Carol J. Burchardt, *Procedures for Court Consultations on Child Custody Issues*, 65 Soc. Casework 259, 261 (1984) [hereinafter Hoorvitz & Burchardt]; Luftman et al., *supra* § [2.16](#), at 331; Wallerstein & Kelly, *supra* § [2.10](#), at 310; *see also* Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children*, 35 Demography 135, 135 (1998). In such positive circumstances, "divorced parents can continue to share a parenting relationship while terminating, both legally and emotionally, a marital relationship." Ahrons, *Joint*, *supra*, at 202.

Sometimes, when parents separate and one has been less involved with child activities, that parent wants more involvement, fearing a loss of the child. That parent may turn out to be a good candidate for joint custody, but caution is required. Although some parents claim that the divorce will change the nature of their interaction with their child, pre-divorce behavior is often predictive of post-divorce relationships.

Barbara Handschu & Mary Kay Kisthardt, *Family Law: Joint-Custody Pointers*, Nat'l L.J., July 17, 2000, at A14.

Shared decisions may be difficult to reach in some circumstances. Therefore, it is helpful for the custody agreement to include a means of making decisions when the parents cannot agree. The common example of this is the joint sharing of major educational decisions (typically defined as decisions regarding retention, grade acceleration, and participation in special education or gifted education programs). If parents wish to share in making those decisions, that should be written expressly into the agreement as a shared decision, with the additional provision that, if at any point in the future the parents cannot agree on the specific set of decisions, the recommendation of the current school authority will be followed. Bender, *supra* § 2.5, at 128. In general, highly detailed agreements have been shown to reduce anxiety and to produce higher levels of cooperation. *Id.* at 127.

To make joint custody work positively, both parents must trust the other's abilities and believe that the other parent will do what is best for the child. The parents need to be able to discuss the child's progress, especially if there are problems. In addition, the parents must be able to take a common approach to dealing with the child when it is necessary. Arbuthnot & Gordon, *supra* § 2.18, at 18; Anne Opie, *Ideologies of Joint Custody*, 31 Fam. & Conciliation Cts. Rev. 313, 325 (1993); Kim Evonne Rockwell-Evans, *Parental and Children's Experiences and Adjustment in Maternal Versus Joint Custody Families*, 53 Dissertation Abstracts Int'l, A: Humanities & Soc. Sci. 1910-A (Nov. 1991). If there is continued conflict between the parents, the child must not be involved in the conflict in a detrimental manner.

3. Sole Custody Versus Joint Custody [§ 2.26]

Sole legal custody means the condition under which one party has legal custody. [Wis. Stat.](#) § 767.001(6). In other words, the parent with sole legal custody has the responsibility of making all major decisions concerning the child. See [Wis. Stat.](#) § 767.001(2m). Sole legal custody is generally not favored because it cuts one parent out of the decision-making role. Thus, joint custody has become more common, and there are some who suggest that it is the best arrangement in all cases and that there should even be a presumption in favor of joint custody.

Nonetheless, although there are reasons why joint custody may be advantageous, there are also reasons why it is not necessarily the best setup in all situations. Therefore, it is imperative that each case is analyzed individually to determine the needs of the children and to evaluate the parents' capabilities. Ronald Richard Wilkinson, *A Comparison of Children's Post-Divorce Adjustment in Sole and Joint Physical Custody Arrangements Matched for Types of Parental Conflict*, 54 Dissertation Abstracts Int'l, A: Humanities & Soc. Sci. 1110A (Sept. 1993); see also *infra* § 2.41 (discussing considerations for custody and physical placement under [Wis. Stat.](#) § 767.41(2)(d)1. and (6)(g)). Studies have demonstrated that custody type alone does not predict social-emotional adjustment of children two years after the parents file for divorce. Marsha Kline et al., *Children's Adjustment in Joint and Sole Physical Custody Families*, 25 Developmental Psych. 430, 435 (1989). Children's adjustment was unrelated to the type of custody arrangement, Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 Am. J. of Orthopsychiatry 233, 247 (1990), but was dependent on factors such as quality of interactions with parents and personal development issues.

"Joint custody tends to *equalize power and authority* between parents." Meyer Elkin, *Joint Custody: Affirming That Parents and Families Are Forever*, 32 Soc. Work 18, 20 (1987) [hereinafter Elkin]. Such an arrangement fosters parental discussions of problems in child rearing. Bender, *supra* § 2.5, at 124. In fact, joint custody results in less litigation and relitigation. *Id.* at 125. Some research claims that all parties involved in joint custody arrangements are more emotionally healthy than their counterparts in sole custody arrangements. R.J. Glover & C. Steele, *Comparing the Effects on the Child of Post-Divorce Parenting Arrangements*, 12(2/3) J. of Divorce 185, 200 (1988-89). The parents perceive themselves as more satisfied, with increased self-esteem and nurturing ability caused by having more contact with their children. Parents in joint custody agreements perceive themselves as having greater influence on their children. Joyce A. Arditti, *Differences Between Fathers with Joint Custody and Noncustodial Fathers*, 62 Am. J. of Orthopsychiatry 186 (1992). In contrast, sole custody decrees often cause the noncustodial parent to feel disenfranchised, creating more likelihood that child support will not be regularly forthcoming. Bender, *supra* § 2.5, at 123. Sole custody produces an unequal power situation in which visitation may be denied and emotional blackmail is more likely to occur. *Id.* at 117.

In general, joint custody works because of the respect parents have for the bonds between the children and each parent, and the parents' ability to empathize with each other and their children. Typically, parents who do this successfully are characterized by high self-esteem, flexibility, and openness. S. Steinman et al., *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. of Am. Acad. of Child Psychiatry 554, 561-62 (1985) [hereinafter Steinman et al.]. Some parents choose joint custody even though they maintain a level of hostility toward each other. If the conflict diminishes over time, it usually is not from more effective cooperation but from diminished communication

between the parents as they come to tolerate variations in different households. Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of the Law*, 92 Mich. L. Rev. 1808, 1828 (1994) (reviewing Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992)); *see also* Luftman et al., *supra* § 2.16, at 339 (citing study that “reported that most parents had disengaged from conflict by third year following separation”). Sole custody, although both useful and necessary in some situations, is not ideal because it places the burden of making major decisions for the children on one parent while the other parent is entirely excluded from the decision-making process.

I. Physical Placement [§ 2.27]

In [Wis. Stat.](#) § 767.001(5), *physical placement* is defined as “the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child’s care, consistent with major decisions made by a person having legal custody.”

The decision about physical placement is generally made by the court upon a recommendation from the children’s guardian ad litem. *See* [Wis. Stat.](#) § 767.407(1). If certain conditions exist in a contested action for modification of custody or placement, the appointment of a guardian ad litem is discretionary, rather than mandatory. The court need not appoint a guardian ad litem if the contested action is one to modify an existing custody or placement order, the modification sought would not substantially alter the amount of time either parent may spend with the child, and the court makes at least one of the following findings: (1) that the appointment of a guardian ad litem would not assist the court in making its determination because the circumstances make the likely determination clear; or (2) that a party seeks the appointment of a guardian ad litem for tactical purposes and not for a purpose that is in the child’s best interest. [Wis. Stat.](#) § 767.407(1)(am).

In most cases, the parties agree to a shared-placement arrangement, which allows the children to live part-time with each parent. Shared-placement arrangements vary widely—from situations in which the children stay in one location while the parents move in and out to others in which the children stay with one parent on weekends only, for vacations, for one day a week, or even during odd years. With some short-term “block time” arrangements, children spend alternate months, alternate weeks, split weeks, alternate days, or even split days with each parent. A.E. Atwell et al., *Effects of Joint Custody on Children*, 12 Bull. of Am. Acad. of Psychiatry & L. 149, 151 (1984) [hereinafter Atwell et al.]. Thus, in place of the traditional family structure, a binuclear family with two households (maternal and paternal) becomes the nucleus of the child’s family of orientation. Ahrons, *Redefining*, *supra* § 2.16, at 439. The possibilities for shared-placement arrangements are limited only by the creativity of those involved. Elkin, *supra* § 2.26, at 19–20.

Because no single shared-placement arrangement is best for all families, the optimal arrangement is workable, realistic, and agreed to by those involved. The best arrangement is not necessarily the simplest. *Id.* at 15. One great advantage of shared placement is that the children are able to maintain close ties with both parents while the parents share responsibility for the children’s upbringing. Bender, *supra* § 2.5, at 118.

In making the recommendation about physical placement, the guardian ad litem must consider the child’s wishes but is not bound by those wishes. Giving a lot of weight to a child’s preference for physical placement is generally not good practice. Although “dependent children are selective in their criticisms, do not exaggerate their problems, and do not grumble about minor inconveniences,” Malcolm Bush & Andrew C. Gordon, *The Case for Involving Children in Child Welfare Decisions*, 27 Soc. Work 309, 312 (1982), they do have their own special interests and biases. A child’s preference for a particular physical-placement arrangement may be based on considerations that are not in the child’s long-term best interests. Therefore, if information from a child is obtained, it should be verified with an informed person, *id.*, and a determination must be made as to the competence of the child to make an objective judgment. Hoorvitz & Burchardt, *supra* § 2.25, at 263.

In addition, children are known to remember recent kindnesses—even from a punitive parent—and are likely to be influenced by such acts. Phillips, *supra* § 2.16, at 11. In fact, a study of punitive parents involving young children as subjects demonstrated that the behaviors of a punitive parent are in general recalled more often than the behaviors of a neutral parent. Elaine Pittman et al., *Punitive Parents as Models: Effects of Reward-Incentives and Sex of Model on Recall of Punitive Parental Behaviors* 11 (paper presented at the annual meeting of the Southeastern Psych. Ass’n, Atlanta, Ga., Mar. 23–26, 1983). Thus, it is difficult to get an accurate picture exclusively from the involved child. Moreover, children are by definition persons in need of adult caretakers who can determine what is best for them. Goldstein et al., *Before*, *supra* § 2.5, at 122.

Another reason to avoid asking for a child’s physical-placement preference is that making such a choice can create intense feelings of guilt in the child because children’s loyalties are usually divided. E. Lassers & W.J. Lassers, *Children and Parents in Divorce*

Court, 45 Am. J. of Psychoanalysis 77, 84 (1985) [hereinafter Lassers & Lassers]. “Rather than acting in their own best interest, children caught in such a loyalty bind may indicate a preference for the parent who needs them more (due to depression, alcoholism, etc.) and/or is more insistent on their selection, as evidenced by parental coaching.” Garrison, *supra* § 2.8, at 85. However, children can often provide insights into a family situation that are not otherwise available. “[A]sking questions such as, ‘If you were having a nightmare, who would you like to comfort you?’” can provide valuable information. Luftman et al., *supra* § 2.16, at 346. If “a child is obviously campaigning for a certain parent it might be advantageous to ask the child directly with whom they want to live as they are trying so hard to convey their choice. Having their say, they might then relax and answer questions ... more honestly.” *Id.* Depending on the age, maturity, and emotional state of the child, the guardian ad litem can, with sensitivity and tact, allow the child to express a physical-placement preference. Kaslow, *supra* § 2.24, at 58, 64. It is imperative, however, that each child and situation be assessed for the appropriateness of direct questioning. Questions could examine the quality of the parent-child relationship and the child’s anticipated advantages and disadvantages of each living situation. Garrison, *supra* § 2.8, at 85. Children must be made aware that adults, not the children themselves, make the final decision. Lassers & Lassers, *supra*, at 84; Jack C. Wall & Carol Amadio, *An Integrated Approach to Child Custody Evaluation: Utilizing the “Best Interest” of the Child and Family Systems Frameworks*, 21(3/4) J. of Divorce & Remarriage 39, 48 (1994) [hereinafter Wall & Amadio].

The guardian ad litem must be an advocate for the children’s best interests. See [Wis. Stat.](#) § 767.407(4). To determine what is in the children’s best interests, the guardian ad litem should see each parent with the children. Although it is not possible to determine the honesty of parent-child interactions in one formal visit, such a visit does provide “an opportunity to observe how the parents and children relate nonverbally, their capacity for empathy, attentiveness, and their ability to facilitate spontaneity while maintaining order.” Charles P. Barnard & Gust Jenson, III *Child Custody Evaluations: A Rational Process for an Emotion-Laden Event*, 12 Am. J. of Fam. Therapy 61, 66 (Summer 1984) [hereinafter Barnard & Jenson]. Seeing the children both individually and as a group is also valuable in determining sibling patterns of interaction, alliances, and coalitions, and in assessing “which [children] may be ‘at risk’ of being used or rejected by a parent.” *Id.*

The guardian ad litem must remember that children need “warm, affectionate, and responsive parent-child relationships with appropriate parental expectations and control,” Janet R. Johnston, *Research Update: Children’s Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 Fam. & Conciliation Cts. Rev. 415, 422 (1995) [hereinafter Johnston, *Research Update*], ideally with the parent being capable of meeting the developmental needs of the children. See Luftman et al., *supra* § 2.16, at 335. The potential for ongoing conflict between the parents needs to be minimized. In some situations, other factors, such as substance abuse, need to be addressed. Although the absence of substance abuse and psychological disturbance is preferred, Johnston, *Research Update*, *supra*, at 422, it is not the diagnosis of psychiatric impairment that is the concern but its effect “upon the parent-child relationship and whether the child is in any particular danger.” Stephen P. Herman, *Special Issues in Child Custody Evaluations*, 29 J. of Am. Acad. of Child & Adolescent Psychiatry 969 (1990) [hereinafter Herman]. If there is concern about both parents’ capabilities, substitute caregivers may be needed. If there is a history of domestic abuse, then supervised visits may be in order. Johnston, *Research Update*, *supra*, at 424–25; see also [Wis. Stat.](#) § 767.41(6)(g).

Additional information about the children can be obtained through standard psychological tests and procedures. Barnard & Jenson, *supra*, at 65. In instances in which such tests might be useful, the mental-health professional can be of assistance. Such tests can be performed independently or requested at the child’s school. In fact, data may already be available from previous testing done at the school. Tests can provide valuable information not only about family dynamics but also about children’s educational needs. Of the school-aged population, approximately 15% have special or exceptional educational needs, according to the National Center for Education Statistics. Nat’l Ctr. for Educ. Stat., U.S. Dep’t of Educ., *Digest of Education Statistics* ch. 2 tbl.204.30 (2023), https://nces.ed.gov/programs/digest/2023menu_tables.asp (follow “Table 204.30” hyperlink) <https://nces.ed.gov/pubs2016/2016006.pdf>. The guardian ad litem should consider such needs in determining physical-placement recommendations.

Contact with the child’s school is also recommended. Teachers, counselors, social workers, psychologists, and principals are in a good position to judge how a child is responding to family upheaval because of their acquaintance with the child and their general understanding of child development. Rowling, *supra* § 2.8, at 4. Children’s distress can be manifested in numerous ways and with varying intensity. Teachers, however, commonly report effects on academic achievement. Wallerstein & Kelly, *supra* § 2.10, at 268. According to one report:

Children from newly formed single-parent families were found in many cases to: *actively seek* the attention and help of their teachers, play *less maturely* and with *less imagination*, be more dependent, “act out” more, and be less cooperative than their classmates from two-parent families.

It is interesting to note here that these conditions lasted longer with boys than girls—in fact within two years of the transition in family structure most of these adverse effects had disappeared for girls, while for boys the effects were more enduring.

Robert A. DiSibio, *The Effect of Single-Parent Family on the Academic, Emotional, and Social Achievement of the Elementary School Child* 11 (1981).

Once the guardian ad litem has formulated a recommendation, the proceedings regarding physical placement should be concluded as rapidly as possible. A child's perception of time is very different from that of an adult. For example, infants and toddlers find it difficult to comprehend more than a few days of time. For children under five years of age, more than two months is incomprehensible. Likewise, for young school-aged children, six or more months cannot be understood. With older school-aged children, more than one year is beyond their understanding. Adolescents, however, generally react to time periods as adults do. Goldstein et al., *Beyond*, *supra* § 2.5, at 40–41; Lita Linzer Schwartz, *Enabling Children of Divorce to Win*, 32 Fam. & Conciliation Cts. Rev. 72, 79 (1994) [hereinafter Schwartz, *Enabling*]. A relatively quick decision about physical placement diminishes the negative effects of delay for the children and enables parents to get on with restructuring their lives. Barnard & Jenson, *supra*, at 63–64.

Once the parties agree to a shared-placement arrangement, they must develop a placement schedule and a plan for dealing with the children's needs. A placement schedule can be as strict or as flexible as the parties prefer. With parties who have trouble getting along, however, a strict schedule may be the best option to avoid future conflict. A good plan contains seven basic components: determination of the residence of the child, how holidays are to be handled, financial support, management of routine care, decision-making authority, legal custody, and how impasses are to be handled. Lois Gold, *Between Love and Hate: A Guide to Civilized Divorce* 108–13 (1992). When these items are explicit, the plan is understandable, making the likelihood of its being followed with little conflict a real possibility. The physical setup needs to be one in which the child does not experience repeated discontinuity. Hoorvitz & Burchardt, *supra* § 2.25, at 262. In other words, school-aged children and adolescents should be able to attend one school and take part in activities on a regular basis. Thus, the plan needs to accommodate the parents' work schedules. Flexibility should be incorporated in the plan with provisions to make changes when needed. Florence Bienenfeld, *Helping Your Child Through Your Divorce* 98–99 (1987) [hereinafter Bienenfeld, *Helping*]. Parents should also consider co-parenting classes or other kinds of counseling to help them adjust to the shared parenting situation.

The guardian ad litem should also consider the environmental resources available to each parent. Resources relevant to a physical-placement decision may include quality daycare (or, alternatively, the family's financial ability to support a parent who stays at home with the children); educational programs, including those for children with special needs; and community programs, such as mental-health clinics and alcoholism support services. *Id.* at 65. Adolescents require additional consideration since they have an age-appropriate need to spend time with their friends. Thus, any time-sharing agreement should be crafted so as not to frustrate and disrupt typical adolescent social interactions. Adler, *supra* § 2.16, at 101; Bienenfeld, *Child*, *supra* § 2.16, at 60.

There is ample evidence that fathers can function effectively as single parents. Studies have shown that fathers who have frequent and effective interaction with their children from infancy are more likely to seek physical placement, adjust more readily to being single parents, and feel more comfortable with the placement. Shirley May Harmon Hanson, *Single Custodial Fathers* 11 (paper presented at the annual meeting of the Nat'l Council on Fam. Relations, Milwaukee, Wis., Oct. 13–17, 1981). Many fathers with physical placement “tend to accommodate their lives to their children more than fathers in two parent families, and ... to take more interest in child care facilities and education and become less disciplinarian than other fathers.” Phillips, *supra* § 2.16, at 12. Likewise, fathers who have chosen to take part in a shared-physical-placement arrangement have been shown to be more involved than fathers who do not have shared physical placement in postdivorce parenting—involvement being measured by participation in activities, contact with the children, and assumption of responsibility and decision-making. Madonna E. Bowman & Constance R. Ahrons, *Impact of Legal Custody Status on Fathers' Parenting Postdivorce*, 47 J. of Marriage & Fam. 481, 486 (1985).

Physical-placement schedules should be revisited at regular intervals to determine whether they are meeting the child's developmental stage and specific needs. The needs of a teenager vary greatly from those of a preschooler. William G. Austin, *Risk Reduction Interventions in the Child Custody Relocation Case*, 33(1/2) J. of Divorce & Remarriage 65, 70 (2000). Also, if family circumstances have changed, it may be necessary to change the physical-placement schedule. The existence of a healthy psychological bond is an important consideration when evaluating the appropriateness of shared placement. Nancy Rainey Palmer, *Legal Recognition of the Parental Alienation Syndrome*, 16 Am. J. of Fam. Therapy 361, 363 (1988). It may be unclear who the primary parent is in the child's life, and the guardian ad litem should pay attention to how each parent has demonstrated to the child that the child is valued, as well as to the length of time each parent has been the child's primary caretaker. Hoorvitz & Burchardt,

supra § [2.25](#), at 262. If the child's adjustment is adequate, then disruption in the placement arrangement may not be justified. Compelling reasons to change placement arrangements include the following: the separation of the family was fairly recent; the child is poorly adjusted; or there has been a change in the parent's capacity to meet the needs of the child. *Id.* at 261. *But see* [Wis. Stat. § 767.451\(1\)](#) (stating requirements for substantial modification of orders for custody or physical placement).

Although shared placement may be the preferred choice in many cases, constant changes in physical placement can be very difficult for the child who experiences repeated loss and regaining of attachment. The positive and negative effects of such loss and gain must be weighed to determine the net advantage or disadvantage of such a placement arrangement. Arbuthnot & Gordon, *supra* § [2.18](#), at 24; Shelton, *supra* § [2.5](#), at 9. Some children simply do not have the time or energy to successfully develop two different peer and social environments. Atwell et al., *supra*, at 156.

Moreover, ongoing conflict and continual disputes over the children create situations in which children have poorer adjustments in shared-placement arrangements. Frequent moving between the parents' homes provides an opportunity for the parents to continue their conflict and repeatedly subject their children to psychological trauma. Arbuthnot & Gordon, *supra* § [2.18](#), at 24; Atwell et al., *supra*, at 156; Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangement Improve the Parent-Child Relationship?*, 54 J. of Marriage & Fam. 837, 839 (Nov. 1999); Johnston, *Research Update*, *supra*, at 420–21; Luftman et al., *supra* § [2.16](#), at 339; E.D. Sorensen & J. Goldman, *Custody Determinations and Child Development: A Review of the Current Literature*, 13(4) J. of Divorce 53, 60 (1990). Ongoing conflict notwithstanding, some experts argue that the continual environmental changes that occur in shared-placement arrangements rob children "of security, predictability, and the continuation of a pattern of parenting they trust and understand, and one voice to guide them." Sheila James Kuehl, *Against Joint Custody: A Dissent to the General Bullmoose Theory*, 27(2) Fam. & Conciliation Cts. Rev. 37 (1989).

Other characteristics that are associated with negative outcomes in shared-placement arrangements are a history of family violence (emotional, physical, or sexual), a history of substance abuse, a parent's belief that the other parent is a bad parent, a parent's anger that leads to continual punishment of the ex-spouse, parents' inability to separate their own feelings and needs from the needs of their children, a history of child neglect, mental pathology, a history of child kidnapping, parents' inability to agree on child-rearing practices, the children's desire not to be in a shared-placement arrangement, the parents' wishes not to have shared placement, or logistics (such as geographic distance and work schedules) that make shared parenting impractical. Arbuthnot & Gordon, *supra* § [2.18](#), at 18; Elkin, *supra* § [2.26](#), at 21; Steinman et al., *supra* § [2.26](#), at 562; Wall & Amadio, *supra*, at 45.

J. Visitation [§ 2.28]

Parents and children are not the only people who are affected by a divorce. Often, grandparents, stepparents, and others who may have had a close relationship with the children suddenly find that they have been cut off from the children for some reason. To protect the interests of these people, the statutes allow them to seek visitation rights. Requests for visitation by third parties are increasingly common in cases of divorce, separation, or death of a parent. In Wisconsin, third parties may petition for visitation rights under one of the following statutes: [Wis. Stat. § 48.925](#), [49.9795\(12\)](#), or [767.43](#).

Under [Wis. Stat. § 48.925\(1\)](#), a relative may petition for visitation with a child who has been adopted by a stepparent or other relative if the relative and child have had a relationship similar to that between parent and child within the two-year period preceding the filing of the petition. Visitation may be granted if (1) the court determines that the visitation is in the child's best interests; (2) the relative will not interfere with the child's relationship with the child's parents; and (3) the relative will not act in a way that is contrary to parenting decisions the parents have made regarding the child's physical, emotional, educational, or spiritual welfare. [Wis. Stat. § 48.925\(1\)](#).

[Wis. Stat. § 767.43](#) allows a court to grant visitation rights to a petitioning grandparent, great-grandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship with the child if the court determines that visitation is in the best interest of the child. Grandparents in particular can be a source of emotional support for the child, providing a sense of security and confirmation that some things stay the same. Neugebauer, *supra* § [2.19](#), at 158.

Wisconsin courts have held, however, that there is no right to visitation under the former [Wis. Stat. § 767.245](#) (now [Wis. Stat. § 767.43](#)) in situations in which another action affecting the family is not already pending and the family unit is intact. *See Van Cleve v. Hemminger*, [141 Wis. 2d 543](#), [415 N.W.2d 571](#) (Ct. App. 1987); *see also David S. v. Laura S. (In the Int. of Brandon S.S.)*, [179 Wis. 2d 114](#), [507 N.W.2d 94](#) (1993); *Cox v. Williams*, [177 Wis. 2d 433](#), [502 N.W.2d 128](#) (1993); *Soergel v. Raufman*, [154 Wis. 2d 564](#), [453 N.W.2d 624](#) (1990); *Marquardt v. Hegemann-Glascock (In re Grandparent Visitation of Hegemann)*, [190 Wis. 2d 447](#), [526 N.W.2d](#)

[834](#) (Ct. App. 1994); *Patricia H.C. v. Louise H. (In re Paternity of Nastassja L.H.-J.)*, [181 Wis. 2d 666](#), [512 N.W.2d 189](#) (Ct. App. 1993); *Bybee v. Noonan (In re Custody of Noonan)*, [171 Wis. 2d 706](#), [492 N.W.2d 172](#) (Ct. App. 1992). *But see Holtzman v. Knott (In re Custody of H.S.H.-K.)*, [193 Wis. 2d 649](#), [533 N.W.2d 419](#) (1995) (woman who helped raise child conceived by same-sex partner, and who had parent-like relationship with child, could seek visitation with child). Amendments to this statute, renumbered as [Wis. Stat. § 767.43](#) effective January 1, 2007, *see* 2005 Wis. Act 443, § 101, have not legislatively altered this rule.

Under [Wis. Stat. § 48.9795\(12\)](#), a stepparent or grandparent may petition for visitation with a minor child if one or both of the child's parents are deceased. The stepparent or grandparent may file the petition in a proceeding under [Wis. Stat. § 48.9795](#) for a minor guardianship of the person or a temporary minor guardianship of the person that affects the child or may commence an independent action for visitation under [Wis. Stat. § 48.9795\(12\)](#). The surviving parent or other person who has custody of the child must have notice of the hearing. The court may grant visitation if it determines that visitation is in the child's best interest.

Because all the above statutes require the court to determine that visitation is in the child's best interests, the guardian ad litem has a crucial role to play in the court's decision. *See Holtzman*, 193 Wis. 2d at 690–91 (saying that courts need to consider the best interests of the child in visitation cases, even when there are contractual or public policy considerations). Among the suggested factors for the guardian ad litem to explore and present to the court are the following: the quality of the relationship between the parents and the grandparent or other petitioner; the child's physical and mental health; the child's prior or continuing relationship with the petitioner, including residence with the petitioner; previous agreements regarding visitation; and parental fitness. Jacquelynn B. Rothstein, *Grandparent Visitation Rights*, Wis. Law., Nov. 1992, at 10, 56. The guardian ad litem needs to balance the value of maintaining ties between the child and the petitioner with the emotional cost to the child of not honoring the parents' decisions concerning visitation with third parties. Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 30 Fam. & Conciliation Cts. Rev. 121 (1992).

The statutes discussed above all allow the court to consider the child's wishes when deciding whether to grant visitation rights to the petitioner. The guardian ad litem should consider the child's age, maturity, and emotional state when deciding whether to elicit the child's preferences regarding visitation with third parties.

Guardians ad litem should also be aware of a related statute, [Wis. Stat. § 767.225\(1\)\(am\)](#), which concerns the granting of physical placement during the pendency of an action affecting the family. It provides that the court may make a temporary order,

[u]pon the request of a party, granting periods of physical placement to a party in a manner consistent with [\[Wis. Stat. §\] 767.41](#). The court shall make a determination under this paragraph within 30 days after the request for a temporary order regarding periods of physical placement is filed. If the court grants physical placement to one parent for less than 25 percent of the time, as determined under [\[Wis. Stat. §\] 49.22\(9\)](#), the court shall enter specific findings of fact as to the reasons that a greater allocation of physical placement with that parent is not in the best interests of the child.

Finally, guardians ad litem should be familiar with [Wis. Stat. ch. 324](#), which describes specific provisions related to custody and visitation in cases involving deployed service-member parents.

K. Stepfamilies [§ 2.29]

While considering each stepfamily and its uniqueness, it is important to remember that the family relationships in all stepfamilies are complicated by the fact that one family has joined another. Each new member seeks a place in the new family unit and, in so doing, may enhance or sabotage a positive adjustment.

Stepfamily members lack a common history and thus, as members of a new family unit, they do not automatically love each other. For example, it may be very difficult for a new stepparent to accept an adolescent who is going through the normal ups and downs of the teen years. The original parent may bring more commitment based on many years of involvement in the child's development. On the other hand, the new stepparent's relative detachment may make him or her *more* understanding than the other adult.

Allegiances between children in stepfamilies are unpredictable. The children may ally themselves according to biological ties, age groups, sex, personalities, or interests. They may be jealous of the attention accorded stepsiblings. The adult-child allegiances are likewise unpredictable.

Loyalty issues can produce great stress in stepfamilies. Children often feel torn between their divorced parents but feel guilty if they like their stepparents too much. Parents can feel conflicted loyalties between children from their previous marriage and their new spouse. In addition, children sometimes expect their parents to give them priority over a new spouse within the stepfamily. Sharon Moore & Claire Cartwright, *Adolescents' and Young Adults' Expectations of Parental Responsibilities in Stepfamilies*, 43(1/2) J. of Divorce & Remarriage 109, 114 (2005) [hereinafter Moore & Cartwright].

Difficulties in adjusting to stepfamilies are often expected. However, research has shown that some behaviors attributed to divorce and remarriage were already present in the predivorce family. E. Mavis Hetherington et al., *Coping with Marital Transitions: A Family Systems Perspective*, 57 Monographs of Soc'y for Res. in Child Dev. 205 (1992). The “high incidence of behavior problems in stepchildren can be attributed to stresses that preceded the remarriage, to factors associated with an unsatisfactory first marriage, to the divorce itself, and to life in a one-parent family.” *Id.* at 4. “[T]here is great variability in how children fare in stepfamilies and some children do well.” Moore & Cartwright, *supra*, at 110.

Although the considerations given to custody and physical placement apply in all family situations, the guardian ad litem needs to be aware of the unique complexity of the stepfamily situation.

L. Nontraditional Families [§ 2.30]

Because divorce has become increasingly common in our society, it is no longer unusual for stepchildren to be part of a family. There are still other so-called nontraditional family situations that occur, although with less frequency. *See generally* Christopher S. Krimmer et al., [Advising the Evolving Family](#) (State Bar of Wis. 2d ed. 2021). Examples of these include gay parents (both gay men and lesbians), cohabiting parents, parents in interracial relationships, and parents who practice non-mainstream religions. Carol S. Bruch, *Forms of Exclusion in Child Custody Law*, 7 *Ethology & Sociobiology* 339, 345 (1986); Lisa D. Walker, *Problem Parents and Child Custody*, 4 *Am. J. of Fam. L.* 155, 161 (1990). In assessing possible physical-placement arrangements, it is imperative for those making recommendations and decisions to “recognize that the children are not responsible for their families’ decisions or actions. Just as children have no control over their race, gender, or any other part of their physical make-up, they also have no control over the family in which they live.” Karyn Wellhausen, *Children from Nontraditional Families—A Lesson in Acceptance*, 69 *Childhood Educ.* 287, 288 (1993). The ability of the parents to fulfill their parenting responsibilities must be separated from the family form in which the parents and children reside. Wall & Amadio, *supra* § 2.27, at 47–48.

The relationship between a gay parent’s parenting skills and children’s development has been studied by researchers. The general conclusion has been that in families in which there is a gay parent, there is “no appreciable difference in parenting abilities from those of heterosexual parents, no known detrimental effect upon the children, and no evidence of an increase in homosexuality in such children.” Herman, *supra* § 2.27, at 970. “There is extensive scientific evidence that these children encounter no increased risks in their educational, cognitive, emotional, or sexual development compared with children who grow up with heterosexual parents.” Martin T. Stein et al., *A Difficult Adjustment to School: The Importance of Family Constellation*, 114 *Pediatrics* 1464, 1464–65 (2004).

Although little research exists on other nontraditional family types, it is imperative that when considering the appropriateness of nontraditional family atmospheres for childrearing, the family circumstances are balanced with all other factors so that the ultimate decision regarding physical placement of the children is not prejudicial. Arthur S. Leonard, *From Law: Homophobia, Heterosexism and Judicial Decision Making*, 1 *J. of Gay & Lesbian Psychotherapy* 65, 86 (1991).

M. Resist-Refuse Dynamics and Parental Alienation [§ 2.31]

1. In General [§ 2.32]

Note. The author acknowledges the assistance of Jonathan Gould, PhD, ABPP, in the succinct description of resistant and refusal behaviors as well as gatekeeping.

Children of divorce face many changes and challenges.

Some children resist spending time with a parent because the parent’s behavior has been abusive, while other children are exposed to negative statements, attitudes, and actions that result in the child developing a belief that the other parent is unsafe, unfit, or in

some other ways unsuitable as a parent.

There are also instances in which the custodial parent has not engaged in any inappropriate behavior while the other parent has been reactive, immature, harsh, or demanding, or has demonstrated other similar behaviors that lead their children to avoid contact with that parent.

Children have long been weaponized in family court settings. Some children are placed in the middle of the parents' dispute and end up taking sides to remove themselves from the conflict. This behavior has been particularly recognized in the interpersonal violence literature in which an abusive parent, often the male, uses the children to make the other parent feel guilty about the children or to relay messages; uses visitation to harass the other parent; or threatens to take the children away from the other parent.

While this concept has been historically referred to as "parental alienation," the use of this and similar terms has largely given way to more behaviorally descriptive terms, such as "resist-refuse dynamics" or "parent-child contact problems." The discussion in sections [2.33–40](#), *infra*, shows that, given the continued rejection of opposing constructs and the problems inherent in the current research efforts, the term parental alienation is largely outdated.

2. History and Definition [§ 2.33]

One of the consistent difficulties with the concept of parental alienation has been disagreements concerning its existence and its definition. Historically, parental alienation has been poorly defined. If it cannot be defined clearly, it cannot be measured accurately. If it cannot be measured accurately, it will be difficult to research.

The concept of parental alienation has evolved over time. Psychiatrist Richard Gardner, beginning around the late 1980s, described eight factors that constitute what he coined as "Parental Alienation Syndrome" (PAS). *See, e.g.,* Richard A. Gardner, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (1992). Gardner's work was based solely on his clinical experience, and not on any data or other systematic research efforts. Gardner's conceptualization focused on the parent-child interaction, usually the mother-child interaction, which Gardner described as leading to the rejection of the other parent. Gardner described eight factors (based on observation) that constituted PAS:

1. Campaign of denigration;
2. Frivolous rationalization for the complaint;
3. Lack of ambivalence;
4. Independent thinker phenomenon;
5. Borrowed scenarios;
6. Automatic support or reflexive support;
7. Absence of guilt; and
8. Spread of animosity.

The concept of PAS was immediately controversial. Gardner made claims that were not supported, including the assertion that PAS was a "syndrome," which lent an aura of medical or scientific authority to PAS and was quickly decried as misleading. Another primary criticism was that Gardner placed blame on the custodial mother, adding arguments about biased views of family dynamics. Nonetheless, PAS was commonly introduced in family court cases and became the focus of controversial expert testimony both in support and rebuttal of the concept.

In the late 1980s, the American Psychological Association convened a task force to look at domestic violence in high-conflict family systems. One concern expressed by the task force, based on anecdotal reports, was that abusive fathers were using PAS arguments to wrest children who were being abused from their protective mothers. Mothers' protective actions were viewed as intentional to instruct their children about the dangers of the father. *See* Am. Psych. Ass'n Presidential Task Force on Violence & the Fam., *Report of the American Psychological Association Task Force on Violence and the Family* (1996).

An article written in 2001 rejected Gardner's original position that PAS was caused solely by the favored parent, and the article outlined multiple factors that need to be considered when sorting out potential causes of a child's rejection. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 Fam. Ct. Rev. 249 (2001). Other papers addressing similar concepts include Marjorie Gans Walters & Steven Friedlander, *When a Child Rejects a Parent: Working with the*

Intractable Resist/Refuse Dynamic, 54 Fam. Ct. Rev. 424 (2016); *Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts*, 48 Fam. Ct. Rev. 1 (2010).

A paper published in 2010 reconfigured PAS and renamed it as Parental Alienation Disorder (PAD). William Bernet et al., *Parental Alienation, DSM-V, and ICD-11*, 38 Am. J. of Fam. Therapy 76 (2010). The authors' conceptualization focused on child behavior as opposed to parent-child interaction, and they unsuccessfully attempted to formalize PAD as a psychiatric diagnosis in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, which was released in 2013. Neither PAS nor PAD per se was included as a diagnosis in the *DSM-5*, although the *DSM-5* does address "relational problems." As of the *DSM-5 Text Revision (DSM-5-TR)*, published in 2022, these are described as follows:

Key relationships, especially intimate adult partner relationships and parent/caregiver-child relationships, significantly impact the health of those individuals. These relationships can be health promoting and protective, neutral, or detrimental to health outcomes. In the extreme, these close relationships can be associated with maltreatment or neglect, which has significant medical and psychological consequences for the affected individual. A relational problem may come to clinical attention either as the reason that the individual seeks health care or as a problem that affects the course, prognosis, or treatment of the individual's mental disorder or other medical condition.

DSM-5-TR at 828.

"[C]onditions and psychosocial or environmental problems that may be a focus of clinical attention or otherwise affect the diagnosis, course, prognosis, or treatment of a patient's mental disorder," *id.* at 821, include abuse and neglect and relational problems (such as disruption by separation or divorce). Although these conditions or problems are not mental disorders, many factors involved in PAS are addressed in the *DSM-5-TR*. Nonetheless, although this is an area that is referenced within the *DSM-5-TR*, it is not a psychiatric diagnosis.

The concept of parental alienation was again revisited and reformulated by researchers with a different focus—that of a preferred parent. Jennifer J. Harman et al., *Developmental Psychology and the Scientific Status of Parental Alienation*, 58(10) *Developmental Psych.* 1887 (2022) [hereinafter "Harman et al., *Developmental Psychology*"]. They define "parental alienation" as an outcome caused by behaviors of a preferred parent toward a rejected parent. Under such circumstances, the child rejects the parent for unjustified, exaggerated, or false reasons. Jennifer J. Harman & Demosthenes Lorandos, *Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes*, 27(2) *Psych. Pub. Pol'y & L.* 184 (2021); Jennifer J. Harman et al., *Parental Alienation: The Blossoming of a Field of Study*, 28(2) *Current Directions in Psych. Sci.* 212 (2019). *But see* Joan S. Meier et al., *Harman and Lorandos' False Critique of Meier et al.'s Family Court Study*, 19(2) *J. of Fam. Trauma, Child Custody & Child Dev.* 119 (2022).

Despite disagreement regarding the name, whether the condition should be a psychiatric diagnosis or not, and other similar issues, there is no question that parents at times engage in alienating behaviors that affect their children. Examples include

- Blaming the other parent for the breakup;
- Denigration (referring to the other parent as a "jerk," or as being dangerous);
- Gatekeeping, *see infra* § 2.34;
- Interruption of parenting time;
- Withholding of information from the other parent;
- Statements such as "she doesn't love you" (referring to the other parent); and
- One parent's remarks to children that a parent's new partner is more important than the other parent.

3. Recent Research [§ 2.34]

There is an emerging literature on parental alienation. Indeed, as of the end of 2020, 40% of the publications on parental alienation had been published after 2016. Harman et al., *Developmental Psychology*, *supra* § 2.33, at 1900.

One national judicial organization has published guidelines that include "A Word of Caution about Parental Alienation." Nat'l Council of Juv. & Fam. Ct. Judges, *A Judicial Guide to Child Safety in Custody Cases* 12–13 (2008), https://www.ncjfcj.org/wp-content/uploads/2012/02/judicial-guide_0_0.pdf. They asserted that courts should not accept testimony regarding PAS and noted that the theory positing the existence of PAS has been discredited by the scientific community. They also concluded that PAS testimony

does not pass either the *Daubert* or *Frye* tests. See *Daubert v. Merrell Dow Pharms., Inc.*, [509 U.S. 579](#) (1993); *Frye v. United States*, [293 F. 1013](#) (D.C. Cir. 1923).

One group of researchers reviewed the literature up to approximately 2016, and although their work has been criticized for exclusions, see Edward Kruk, *Parental Alienation as a Form of Emotional Child Abuse: Current State of Knowledge and Future Directions for Research*, 22(4) Fam. Sci. Rev. 141 (2018), they concluded that the PAS research is weak. Michael A. Saini et al., *Empirical Studies of Alienation, in Parenting Plan Evaluations: Applied Research for the Family Court* ch. 13 (Leslie Drozd et al. eds., 2d ed. 2016). They noted the presence of small and non-random samples with no comparison groups. They argued that methodologically sound research concerning parental alienation is limited by the lack of consensus on the definition of alienation as well as by the use of nonstandardized measures and procedures. They concluded that there is a need for more prospective and longitudinal research.

The American Professional Society on the Abuse of Children (APSAC) has also taken a position on parental alienation. APSAC, *APSAC Position Statement: Assertions of Parental Alienation Syndrome (PAS), Parental Disorder (PAD), or Parental Alienation (PA) When Child Maltreatment Is of Concern* (Jan. 22, 2022), <https://apsac.org/wp-content/uploads/2023/05/APSAC-Position-Statement-PAS.pdf>. APSAC concluded that assertions of PAS, PAD, or parental alienation when child maltreatment is present are of concern. APSAC's position statement asserts that child safety from abuse and neglect (as defined by law) takes priority over parental right to contact. It notes that an evaluator must conduct a careful evaluation of the child and parents and should consider multiple explanations for resistance, refusal, or fear on the part of the child. The position statement recommends that investigators rule out explanations other than parental manipulation before concluding the behavior is mostly caused by the preferred parent's actions. They note that other explanations must include the possibility that a child has been maltreated by the less preferred parent or that the child has witnessed abuse by the less preferred parent of the preferred parent, siblings, or other love object such as a pet.

The issue of parental alienation remains polarizing. On one pole are researchers such as Richard A. Warshak, *Divorce Poison: How to Protect Your Family from Bad-mouthing and Brainwashing* (2010); Amy J.L. Baker, *Reliability and Validity of the Four-Factor Model of Parental Alienation*, 42 J. of Fam. Therapy 100 (2018); and William Bernet & Laurence L. Greenhill, *The Five-Factor Model for the Diagnosis of Parental Alienation*, 61 J. of Am. Acad. of Child & Adolescent Psychiatry 591 (2022).

At the other pole are authors who focus on ecological models and family models and reject the four- and five-factor models. Authors supporting this view include Aaron Robb, *Methodological Challenges in Social Science: Making Sense of Polarized and Competing Research Claims*, 58 Fam. Ct. Rev. 308 (2020); Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 Fam. Ct. Rev. 270 (2020); Benjamin D. Garber, *The Chameleon Child: Children as Actors in the High Conflict Divorce Drama*, 11 J. of Child Custody 25 (2014); and Benjamin D. Garber, *Sherlock Holmes and the Case of Resist/Refuse Dynamics: Confirmatory Bias and Abductive Inference in Child Custody Evaluations*, 58 Fam. Ct. Rev. 386 (2020).

There is, however, ongoing research that is related to the concept of parental alienation. Gatekeeping, for example, involves gathering information about relationship development over the child's life. The information might include, among other things, the degree to which the primary caretaker has provided the other parent access to the child during the marriage through the present time. Some caretaker parents have cooperatively shared parenting responsibilities during the marriage, which is viewed as flexible gatekeeping. Other parents have held to rigid sex roles by assigning child care to the mother and work related outside the home to the father. An understanding of the parents' agreements before separation about distribution of caretaking responsibilities informs the extent to which gatekeeping behaviors observed after separation are consistent with the history of parental access. Telephone interview with Jonathan Gould, PhD (July 19, 2024). Gatekeeping behaviors exist on a continuum, ranging from open to denied access. In the presence of a legitimate concern, such as protecting a child from an abusive parent, restrictive gatekeeping is justifiable. When no legitimate foundation exists, restrictive gatekeeping might reflect alienation dynamics.

One group of researchers concluded that gatekeeping behaviors occur on a continuum. William G. Austin et al., *Parental Gatekeeping and Child Custody/Child Access Evaluation: Part I: Conceptual Framework, Research, and Application*, 51 Fam. Ct. Rev. 485 (2013). They noted that maternal gatekeeping attitudes influence fathers' involvement and affect children's adjustment, and restrictive gatekeeping fosters parental conflict. They also noted that assessment of specific situations must consider gatekeeping attitudes as opposed to only gatekeeping behaviors.

Another set of researchers noted that gatekeeping behaviors can affect the other parent's relationship with the child. Michael A. Saini et al., *Adaptive and Maladaptive Gatekeeping Behaviors and Attitudes: Implications for Child Outcomes After Separation and Divorce*, 55 Fam. Ct. Rev. 260 (2017). They suggested a more gender-neutral framework and noted that research in gatekeeping requires the consideration of various working hypotheses.

4. Assessment of Parental Alienation [§ 2.35]

a. Five-Factor Model [§ 2.36]

A five-factor model has been offered for assessment of parental alienation, including the following factors:

1. *Evidence of rejection of the less favored parent.* This behavior on the part of the child is frequent, consistent, and persistent. It is not developmentally expected and targets only one parent.
2. *Presence of prior positive relationship between child and rejected parent.*
3. *Absence of abuse, neglect, or seriously deficient parenting by the rejected parent.*
4. *Patterns of multiple alienating behaviors over time by the favored parent with intent to harm the relationship with the child or harm the other parent directly.* This requires consideration of the child's behavior and the parent's behavior in context and sequence.
5. *The child evidences some or most of Gardner's eight behavioral manifestations of alienation.*

Bernet & Greenhill, *supra* § [2.34](#).

There are no psychometrically sound instruments available for the reliable assessment of parental alienation. One group of researchers offered an approach they refer to as the Parental Acceptance–Rejection Questionnaire (PARQ)-Gap score, which purports to use the differences between parental ratings to differentiate between cases of estrangement versus alienation. This instrument and its application in alienation cases have been strongly criticized. *See, e.g.,* Jean Mercer, *Critiquing Assumptions About Parental Alienation: Part 1. The Analogy with Family Violence*, 19(1) J. of Fam. Trauma, Child Custody & Child Dev. 81 (2022); Jean Mercer, *Critiquing Assumptions About Parental Alienation: Part 2. Causes of Psychological Harms*, 19(2) J. of Fam. Trauma, Child Custody & Child Dev. 139 (2022). The instrument that they used has not been generally accepted for use in the psychological community and has been published only by the study's authors.

b. Alternative Explanations [§ 2.37]

When considering cases involving potential parental alienation, it is important to explore alternative explanations for these dynamics. Benjamin D. Garber and Robert A. Simon, in *Looking Beyond the Sorting Hat: Deconstructing the “Five Factor Model” of Alienation*, 65 J. of Divorce & Remarriage 5 (2023), address this process while attacking the five-factor model. Other explanations might include estrangement, loyalty conflicts, and what Garber and Simon refer to as the “hybrid” case. *Id.* at 11.

Estrangement occurs in situations in which there is evidence of abuse or very poor parenting on the part of the rejected parent. It is an uncommon phenomenon and usually occurs in young adulthood as opposed to earlier childhood. As such, it is unlikely to be encountered by a GAL except in situations in which the behavior of an older sibling influences that of a younger child. Estrangement is not influenced by the behavior of the preferred parent.

When loyalty conflicts are present, they are evidenced by a child or children who try to maintain positive feelings and affection toward both parents while both parents are being hostile toward each other and engaging in negative parenting behaviors.

In a hybrid situation, the rejected parent is estranged through that parent's own actions, and the preferred parent also engages in alienating behaviors.

When guardians ad litem are considering the possibility of parental alienation, there are other factors that should be considered. These include the child's normal preference, behavior on the part of the child to avoid parental conflict, and anxiety on the part of the child (for example, separation anxiety). Other explanations include a stubborn child (for example, a child with oppositional defiant disorder), an abused child, and the possible (although rare) delusional disorder shared by both parent and child. These alternative explanations for a child's parental rejection need to be considered before a person assessing the child concludes that parental alienation is present.

Despite the challenges involved in researching parental alienation, some preliminary information exists. See Harman et al., *Developmental Psychology*, *supra* § 2.33, for a general overview. For example, parental gender is not a factor related to parental alienation, nor are custodial arrangements. Regarding the children, some researchers have identified the presence of gender effects (female children may be more affected), but these gender effects wash out in group comparisons. The age of the child is not a factor, nor are developmental stages that affect vulnerability of the child (although more research is needed in this area).

5. Effects of Parental Alienation [§ 2.38]

The effects of parental alienation are significant and widespread. They affect the rejected parent and extended family as well as the children. In many respects, they are similar to the effect of interpersonal violence and result in impaired emotional, physical, and financial well-being for the rejected parent and family. The parental alienation behaviors have a tremendous impact on children, including the following:

- Depression;
- Anxiety;
- Physical health problems;
- Identity problems;
- Aggression-conduct disorder;
- Drug or alcohol use; and
- False memories.

6. Treatment of Parental Alienation [§ 2.39]

Interventions depend on the severity of the circumstances. When the alienation is mild, it can frequently be properly addressed through psychoeducation (often provided by a neutral therapist), as well as firm and enforceable court orders that relate to parental alienation behaviors. When parental alienation is moderate to severe, more intrusive interventions may be required.

Interventions for mild parental alienation may include the following:

- Family counseling (including parenting skills and psychoeducation);
- Maximizing parenting time for both parents;
- Enforcement of parenting time;
- The provision of sanctions for noncompliance; and
- The assignment of a parenting coordinator with parental alienation training and experience.

In the presence of moderate parental alienation, interventions might include

- A focus on reducing parental conflict;
- Improving parental communication;
- Individual counseling for both parents and children (which must be coordinated with the family court);
- Sanctions for parenting-time violations;
- Efforts to ensure that the children have ample time with the rejected parent; and
- Enhancing the authority of the rejected parent.

In the presence of severe parental alienation, the following interventions might be considered:

- Treating the situation as child abuse and involving child protective services;
- Reversal of custody (often requiring approximately a 90-day no-contact order on the part of the alienating parent);
- Counseling for the alienating parent; and
- Intensive treatment programs, such as Family Bridges and Turning Points for Families.

Prolonged individual treatment of the child with a non-parental-alienation-trained provider is contraindicated.

7. Cautionary Considerations [§ 2.40]

The concept of parental alienation remains controversial. General arguments include a number of different areas. Those who support a “gender paradigm” assert that men are more abusive than women and that mothers’ behaviors are acceptable when they serve to protect children from their abusive fathers. See Donald G. Dutton & Tonia L. Nicholls, *The Gender Paradigm in Domestic Violence Research and Theory: Part I—The Conflict of Theory and Data*, 10 *Aggression & Violent Behav.* 680 (2005). Others claim that parental alienation is merely a legal defense created by abusive fathers to nullify claims of abuse made by mothers. Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GWU L. Sch. Pub. L. Rsch. Paper No. 2019-56 (2019), <https://dx.doi.org/10.2139/ssrn.3448062>. Still others assert that people do not lie about abuse and that parental denigration does not cause parental alienation. Some claim that the five-factor model merely focuses blame on the preferred parent for the child’s resist-refuse dynamic. See William O’Donahue et al., *Examining the Validity of Parental Alienation Syndrome*, 13 *J. of Child Custody* 113 (2016), for a more thorough discussion of these concerns.

This issue of parental alienation and a child’s rejection of one parent remains an important concept in family law. While there is little question that parents engage in alienating behavior at times, the scientific research in this area continues to unfold. Opinions remain polarized and are often not supported by scientific research. Guardians ad litem should proceed carefully when faced with resist-refuse behaviors by children and should consider the multiple factors that may be contributing to those behaviors. Rather than get into the weeds concerning the presence or absence of parental alienation or how to conceptualize it and measure it, today’s guardians ad litem can best provide for the best interests of the child by examining the complex factors that contribute to resist-refuse behaviors and seek effective interventions for the child.

VII.

Role of the Guardian ad Litem [§ 2.41]

The guardian ad litem serves as an advocate for the child, providing a source of unbiased data to the court. Erik Sorensen et al., *Guardian ad Litem Volunteers as Reporters of Family Characteristics in Contested Custody Cases*, 20(3/4) *J. of Divorce & Remarriage* 13 (1993). The guardian ad litem must consider the child’s wishes but is not bound by those wishes. Wis. Stat. § 767.407(4). It is imperative that the guardian ad litem act in the child’s best interests rather than solely on the child’s instructions. Jane Morgan & John Williams, *A Role for a Support Person for Child Witnesses in Criminal Proceedings*, 23 *British J. of Soc. Work* 113, 114–15 (1993) [hereinafter Morgan & Williams]. In fact, the independent, advisory opinion of a GAL may conflict with the child’s stated desires. S.A. Schwartz, *Guardianship*, 2 *Physical & Occupational Therapy in Geriatrics* 63, 65 (1982).

To represent the best interests of the child, the guardian ad litem must acknowledge the GAL’s own values. What is best for one person may be very different from what is best for another. The guardian ad litem must be careful not to project how the GAL would feel in the situation at hand. Instead, it is imperative to assess the circumstances based on the best interests of the child in the *child’s* world. If the guardian ad litem does not differentiate the GAL’s personal value system from the world of the child, it is quite simple to ignore or not search for factual evidence in an effort to prove or disprove one’s own strongly held values and beliefs, M. Adcock, *The Role of the Guardian ad Litem*, 8 *Adoption & Fostering* 22, 23 (1984) [hereinafter Adcock], in place of representing the child’s best interests.

The guardian ad litem usually knows less about the child than do others involved in the child’s life. Sandra Mooney, *Coordination Among the Residential Treatment Center, Guardian ad Litem, and the Department of Social Services, in Adoption for Troubled Children: Preparation and Repair of Adoptive Failures Through Residential Treatment* 49 (Douglas Powers ed., 1984) [hereinafter Mooney]. Therefore, it is imperative that the guardian ad litem seek information about the child from teachers and principals, caretakers, psychological and pediatric records, friends, neighbors, relatives, and lawyers who have been involved with the family to

get as complete a picture as possible of the child's life. Karen Saywitz & Lorinda Camparo, *Interviewing Child Witnesses: A Developmental Perspective*, 22 Child Abuse & Neglect 825, 834 (1998) [hereinafter Saywitz & Camparo]. It can be helpful to observe the child in the school setting. Marie Witkin Kargman, *A Court Appointed Child Advocate (Guardian ad Litem) Reports on Her Role in Contested Child Custody Cases and Looks to the Future*, 3(1) J. of Divorce 77, 81 (1979) [hereinafter Kargman]. Any people who may be significant in caring for the child should be interviewed. These include older siblings and grandparents. Hoorvitz & Burchardt, *supra* § 2.25, at 260.

Some guardians ad litem start each case with a conference of the involved lawyers and clients. This gives the guardian ad litem information about how the parties interact and often helps the lawyers learn more about their clients' relationships. Kargman, *supra*, at 81. Changes for the child will have repercussions for everyone involved. Adcock, *supra*, at 24. By discussing these matters together, the parties may raise possibilities that were never before considered. *Id.* at 22. For example, the parties may find that they could cooperate for the sake of the child and thus cause less disruption in the child's life. By all trying to work together, the parties (and the guardian ad litem) may determine that they are not as polarized as they originally thought.

The guardian ad litem must have access to all relevant reports, records, and confidential information. Abigail B. Sivan & Mary Quigley-Rick, *Effective Representation of Children by the Guardian ad Litem: An Empirical Investigation*, 19 Bull. of Am. Acad. of Psychiatry & L. 53, 56 (1991). In some cases, this will require obtaining releases to get information from psychiatrists, Kargman, *supra*, at 81, doctors, social workers, therapists, psychologists, and schools. If such reports and records do not exist, some guardian ad litem investigations may be enhanced by a mental-health evaluation. Evaluations performed in such situations are not considered confidential, and the participants must be informed of this fact. Cherry Hysjulien et al., *Child Custody Evaluations: A Review of Methods Used in Litigation and Alternative Dispute Resolution*, 32 Fam. & Conciliation Cts. Rev. 466, 473 (1994); Schwartz, *Enabling*, *supra* § 2.27, at 77. Evaluations are valuable only if completed by professionals with expertise in a specific area. For example, psychologists can alert the court to issues concerning sex, age, socioeconomic status, family functioning, parental relationship, parent-child interaction, and social support systems. Schwartz, *Enabling*, *supra* § 2.27, at 77. A psychiatrist may comment on the effect of family upheaval on the child's education, but an educator or educational psychologist would more appropriately discuss the education of the child. Glenn Miller, *The Psychological Best Interests of the Child*, 19(1/2) J. of Divorce & Remarriage 21, 31 (1993) [hereinafter Miller]. Child psychologists and psychiatrists generally have little expertise about nonpsychological issues. *Id.* at 32. The school, on the other hand, is a social system considered by some researchers to have a major influence on personal and social development. Judith S. Brook et al., *A Network of Influences on Adolescent Drug Involvement: Neighborhood, School, Peer, and Family*, 115 Genetic, Soc. & Gen. Psych. Monographs 123, 131 (1989). Thus contacts made with teachers, school counselors, school psychologists, and school social workers may provide very valuable information.

Guardians ad litem should be cautioned, however, about soliciting custody or placement input from a child's therapist. It is well established that therapists who provide such information to GALs or the courts risk compromising their therapeutic relationship with the child. Therapists provide confidential treatment services to children, who may view the provision of information to the courts or other parties as a breach of trust. Even in situations in which the therapist communicates the child's wishes to the GAL, the therapeutic relationship can be negatively affected if the court does not resolve the situation in the manner that the child desires. See Lyn R. Greenberg & Jonathan W. Gould, *The Treating Expert: A Hybrid Role with Firm Boundaries*, 32 Pro. Psych.: Rsch. & Prac. 469 (2001); Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 Pro. Psych.: Rsch. & Prac. 50 (1997).

In cases involving domestic abuse, guardian ad litem recommendations should be designed to create safety for the child, enhance the well-being of the child, and provide stability for the child. Accomplishing these goals may typically require keeping the child with the non-offending parent when at all possible; this approach, by decreasing a spouse's battering, increases safety for an *adult* victim and for the child. In Wisconsin, the custody and physical-placement provisions in the Family Code establish a rebuttable presumption that, if the court finds by a preponderance of the evidence that one parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, "there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody" to that parent. [Wis. Stat. § 767.41\(2\)\(d\)1](#).

Physical-placement arrangements that may be appropriate could include the following:

1. Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate third party;
2. Requiring that periods of physical placement be supervised by an appropriate third party;

3. Requiring the batterer to pay the costs of supervised visitation;
4. Requiring the batterer to complete certified batterer's treatment program;
5. Prohibiting the batterer from being under the influence of alcohol or any controlled substance when the parties exchange the child or during placement; and
6. Prohibiting the batterer from having overnight placement with the child.

See [Wis. Stat. § 767.41\(6\)\(g\)](#). Over time, the requirements can be changed, if warranted.

The guardian ad litem must always be alert to biases in the information obtained. Some prejudices could be caused by individual relationships or personal values. The guardian ad litem should also be aware of misinformation that results from substandard psychiatric or psychological reports. Stephen P. Herman & Alan M. Levy, *Does Peer Review Have a Place in Child Custody Evaluations?*, 18(3) Child. Today 15, 18 (1989). In addition, the *best interests of the child* standard means different things to professionals in different fields. "The legal best interests include *whatever* the law wishes to be defined as constituting best interest. It ... may include moral, physical, and financial considerations. Moreover, constitutional or other legal considerations may pre-empt the best interest principle." Miller, *supra*, at 33. To mental-health professionals, *best interests* concerns the formation of affectionate relationships while the child is developing; predictions of future psychiatric disorders is not in their domain. *Id.* at 32.

In representing a child's best interests, the guardian ad litem is charged with making a recommendation to the court about legal custody and physical placement of the child. The guardian ad litem must consider potential custodians with regard to their (1) ability to provide financially for the child; (2) sense of responsibility for the child's well-being; (3) ability to provide continuity in the child's environment; (4) time available to spend with the child; (5) ability to maintain a good relationship with the other parent; (6) reluctance to get into a legal dispute over custody; (7) ability to provide the most productive support, stimulation, guidance, and discipline; (8) unlikelihood of using the child to further their own aims; (9) demonstration of the most realistic perception of likely difficulties and of the means of addressing such problems; (10) demonstration of flexibility and adaptability with regard to the present and future situation; (11) unlikelihood of relying too heavily on the child for their own emotional needs; (12) unlikelihood of scapegoating the child for the marital failure; and (13) motive for requesting custody. Barnard & Jenson, *supra* § 2.27, at 65; Carol R. Lowery, *Child Custody in Divorce: How Parents Decide* 16–17 (paper presented at the Annual Convention of the Am. Psychological Ass'n, Wash., D.C., Aug. 23–27, 1982); Carol R. Lowery, *Child Custody in Divorce: Parents Describe Their Decisions* 7 (paper presented at the Annual Meeting of the Southeastern Psych. Ass'n, Atlanta, Ga., Mar. 23–26, 1983). These are among the factors parents themselves consider most important in determining custody and physical placement.

The guardian ad litem should remember that parents, as the legal custodians of their children, have the right to make decisions for them. This implies that parents will faithfully discharge their responsibilities. The state intervenes on the child's behalf only when the parents fail to discharge their responsibilities. William Halikias, *The Guardian ad Litem for Children in Divorce: Conceptualizing Duties, Roles, and Consultative Services*, 32 Fam. & Conciliation Cts. Rev. 490, 493 (1994). It becomes the guardian ad litem's responsibility to investigate the situation fully, making recommendations that will protect the child and provide for the child's best interests for the foreseeable future.

The concept of "best interest," however, has been questioned in recent years. Some legal advocates have argued that consideration of the child's best interests might come at the expense of the child's expressed or articulated interests. The effects of client-directed legal representation were evaluated in the Palm Beach County (Florida) Foster Children's Project, and this representation was found to positively affect some aspects of permanency establishment for children in out-of-home care. Andrew Zinn & Clark Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children's Permanency Outcomes*, 53 Fam. Ct. Rev. 589 (2015).

When a client-directed lawyer is appointed, the child is the client and, to the extent possible, directs the lawyer in a traditional attorney-client relationship. The child is protected by the attorney-client privilege. Motions and pleadings are filed advocating for the child's legal rights, and the lawyer works for the child. In the traditional guardian ad litem appointment, the child is not represented in a traditional attorney-client relationship; rather the GAL's duty is to the court. No attorney-client privilege exists, nor is there an obligation to advocate for the child's legal rights, and the lawyer works for the court. Ctr. for Rts. of Abused Child., *Fact Sheet: Recognizing Abused Children's Right to Counsel* (Jan. 5, 2023), <https://www.thecenterforchildren.org/resources/fact-sheet-recognizing-abused-childrens-right-to-counsel>. This concept has also been adopted by the American Bar Association as reflected in its

2011 Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings. Andrea Khoury, *The True Voice of the Child: The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 36 Nova L. Rev. 313 (2012); Andrea Khoury, *ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases*, 30 Child L. Prac. 106 (2011).

Although client-directed advocacy has long been the standard for legal representation of adults, applying such procedures with children might result in a conflict between a child's expressed desires and goals and what the guardian ad litem believes are in the child's best interest, such as supporting the child's access to family, education, and culture. Alternatively, an articulate child might provide information to the court that can expedite reunification and improve permanency.

Such client-directed representation is available in Wisconsin under specific circumstances:

Under the Wisconsin Children's Code, the term "'counsel' means an attorney acting as adversary counsel who shall advance and protect the legal rights of the party represented, and who may not act as guardian ad litem or court-appointed special advocate for any party in the same proceeding." [Wis. Stat.](#) § 48.23(1g). A GAL, in contrast,

shall be an advocate for the best interests of the person or unborn child for whom the appointment is made. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of that person or the positions of others as to the best interests of that person or unborn child.

[Wis. Stat.](#) § 48.235(3)(a).

Given the complexities of their role, the guardian ad litem is well advised to consult, when proper, with a child's advocacy attorney given the potential benefits of input from the child concerning permanency.

VIII. The Interview Process [§ 2.42]

Note. See also the second appendix to this chapter ([appendix 2B](#), *infra*) for a further discussion of the interview process: "Asking Children Questions."

A. Overview [§ 2.43]

The atmosphere and setting of an interview can determine its effectiveness. An atmosphere conducive to communication is imperative for successful interviewing. Alfred Benjamin, *The Helping Interview* 3 (1969) [hereinafter Benjamin]. Further, the interviewer who keeps appointments on time (or provides a sufficient reason why this is not possible) shows respect for the person being interviewed. It is also helpful to all concerned when the interviewer gives a time frame for the interview. *Id.* at 17. In addition, initial interviews should be conducted separately to determine whether domestic abuse has occurred.

When interviewing a child, the guardian ad litem should first introduce himself or herself and explain the guardian ad litem's role. *Id.* at 15; Saywitz & Camparo, *supra* § [2.41](#), at 833. This is very important because the role of the guardian ad litem may be very confusing to the child. Some may view the guardian ad litem as "my attorney." Mooney, *supra* § [2.41](#), at 53. It is important for the guardian ad litem to explain to the child that the child's wishes are very important but that the actual outcome may not be what the child desires. The guardian ad litem should also explain, Wilkes, *supra* § [2.14](#), at 4, the court function so that the child understands the legal system that is about to affect the child's life in many ways. Mooney, *supra* § [2.41](#), at 53; Saywitz & Camparo, *supra* § [2.41](#), at 833. Lack of knowledge about the legal process is likely to cause anxiety and apprehension in children. Morgan & Williams, *supra* § [2.41](#), at 116. It is especially important to keep older children informed of court hearings given that they are aware that judicial decisions will dramatically affect their future. Mooney, *supra* § [2.41](#), at 52–53.

The guardian ad litem should indicate if the interview material cannot be kept confidential. *Id.* at 59. Similarly, if the interview is being taped, the GAL should not conceal this fact. *Id.* at 61. Note-taking may be necessary but should not interfere with the flow of the interview or include comments that the guardian ad litem is not prepared to have the interviewee see. *Id.* at 58. Trust is important if the child is to communicate openly. It is equally important that the child feel respected by the interviewer. *Id.* at 5, 8.

B. Adapting the Interview to the Interviewee's Age [§ 2.44]

When interviewing children, it is necessary to adapt the interview relationship and its settings to the developmental stage of the child. Lisa Amaya-Jackson et al., *Directly Questioning Children and Adolescents About Maltreatment*, 15 J. of Interpersonal Violence 725, 756 (2000); Gail S. Goodman, *Understanding and Improving Children's Testimony*, 22(1) Child. Today 13, 15 (1993) [hereinafter Goodman]; Saywitz & Camparo, *supra* § 2.41, at 826–27; Kathleen J. Sternberg et al., *Effects of Introductory Style on Children's Abilities to Describe Experiences of Sexual Abuse*, 21 Child Abuse & Neglect 1133, 1134 (1997) [hereinafter Sternberg]. A failure to do so “seriously compromises the validity and reliability of the interview.” Walter C. Parker, *Interviewing Children: Problems and Promise*, 53 J. of Negro Educ. 18, 20 (1984) [hereinafter Parker].

Preschool children from about age 3-1/2 years are quite capable of participating effectively in an interview if it is properly conducted. See, e.g., Anne Graffam Walker & Julie Kenniston, *Handbook on Questioning Children: A Linguistic Perspective* (Sally Small Inada & Julie Kenniston eds., 3d ed. 2013). When working with such young children it can be helpful to provide them with other activities such as drawing or playing with Play-Doh during the interview—not for the purpose of eliciting information but to assist them in sitting still and participating in the discussion. Given the typical cognitive development of children in this age group, it is important to modify the way that questions are posed to the child. For example, one should avoid the use of reflexive pronouns or references to past events that are not explicitly named. For example, when discussing a past event, consider the following:

Question: Tell me about your birthday party.

[Child's response]

Follow-up question: Did you have cake and ice cream at it?

The preferred follow-up would be “Did you have the cake and ice cream at *your birthday party*?”

Very young children do not necessarily understand the use of “pointing words,” such as pronouns and other potentially ambiguous references to the topic of conversation. Debra Ann Poole, *Interviewing Children: The Science of Conversation in Forensic Contexts* 16 (2016). When interviewing very young children, it is also important to avoid presenting dichotomous or multiple-choice questions. Young children often will simply agree with an adult, or they will choose an alternative based on primacy or recency principles rather than responding accurately. The use of multiple-choice and yes-or-no questions with very young children is inherently suggestive. Michael E. Lamb et al., *Tell Me What Happened: Questioning Children About Abuse* ch. 6 (2d ed. 2018). Finally, when interviewing children in this age group, it is important to understand that their cognitive development generally does not include the concept of representative awareness, which is the ability to understand that an object simultaneously is both an object and a symbol of something else. For example, asking a child to use a doll to demonstrate something that happened to the child is very likely to result in inaccurate communication. For a more in-depth discussion of this topic, see Judy S. DeLoache, *Early Understanding and Use of Symbols: The Model Model*, 4 Current Directions in Psych. Sci. 109 (1995).

Children in middle childhood and early adolescence (ages 6 to 12) tend to withhold personal information from adults. With this age group, the interviewer's attitude may determine what information, if any, is elicited. The interviewer should strive “to present convincingly a permissive, casual, and accepting attitude.” *Id.* at 21.

When working with children aged 14 to 16, the interviewer needs to respond not as an adult authority, but more as an equal. *Id.*

C. Eliciting Information [§ 2.45]

Listening is crucial to the interview process.

[It] requires, first of all, that we not be preoccupied.... Secondly, listening involves hearing the way things are being said, the tone used, the expressions and gestures employed. In addition, listening includes the effort to hear what is not being said, what is only hinted at, what is perhaps being held back, what lies beneath or beyond the surface.

Benjamin, *supra* § 2.43, at 47.

The interviewer's need to evaluate, deny, or confirm what is being said can create obstacles to good communication. *Id.* at 92. For example, if the interviewer is preoccupied with determining why the interviewee said or did something, the interviewer may not even hear what the interviewee is saying; certainly, the person's nuances, feelings, and tone will be lost.

Active listening promotes a warm relationship because most people find it satisfying to be heard and understood by another person. Gordon, *supra* § 2.11, at 57. The active listener uses paraphrasing, supporting statements, and accepting statements. Paraphrasing should communicate to the speaker that the listener understands what has been said; it should not convey agreement or disagreement or an evaluation of content. Raphael J. Becvar, *Skills for Effective Communication: A Guide to Building Relationships* 66 (1974) [hereinafter Becvar]; Saywitz & Camparo, *supra* § 2.41, at 830. Supporting statements, on the other hand, show the interviewee that the listener is on the same side. Finally, accepting statements simply mirror back to the interviewee the feelings or ideas expressed. Gabriel M. Della-Piana, *How to Talk with Children (and Other People)* 45 (1973) [hereinafter Della-Piana]. "[A]cceptance means treating the interviewee as an equal and regarding his thoughts and feelings with sincere respect." Benjamin, *supra* § 2.43, at 42.

To truly accept an individual, the guardian ad litem needs to feel empathy with him or her. Empathy is not sympathy ("sharing common feelings, interests or loyalties"), nor is it the same as identification with the other person (wishing to be like him or her). *Id.* at 51, 52. Empathy is "feeling yourself into, or participating in, the inner world of another while remaining yourself." *Id.* at 50. Empathy enhances the interview by convincing the interviewee that the individual is understood in both feeling and words. Gordon, *supra* § 2.11, at 89.

Nonverbal communication is also a vital part of the interview. Body language, as well as verbal qualities, such as tone, volume, and emphasis placed on certain words, communicates nonverbally what the parties feel about what is being said. Becvar, *supra*, at 8. The interviewer's nonverbal style may develop increasing trust by showing care and interest, or may destroy the interview relationship by turning the interviewee off. For example, the interviewer who appears not to be listening to the speaker conveys the message that what is being said does not really matter. Similarly, the interviewer can learn a great deal about the interviewee from nonverbal behavior. A person who leans forward and looks the other party in the eye is usually quite confident about what is being said and intent on delivering the message. In contrast, a person who turns even partly away or who sits back and chooses words very carefully may be unsure of what the person is comfortable sharing with the other party. Cues can be picked up from facial expressions, how the person sits, and the way in which the person says the message in addition to the words themselves.

Asking questions is not the only means of eliciting information in an interview. The interviewer may also attempt to draw the interviewee out by restating or paraphrasing what the interviewee has just said, attempting to articulate what the interviewee appears to feel, or asking for clarification. Benjamin, *supra* § 2.43, at 115, 117. Other invitations to talk, commonly called "door openers," include such simple statements as: "I see"; "Oh"; "Mm-hmmmm"; "Tell me about it"; and "Let's discuss it." Gordon, *supra* § 2.11, at 48. These expressions let the other person know the interviewer is listening and following along, which is often enough to encourage the person to continue talking.

Silence is another technique used by interviewers to elicit information from interviewees. Depending on how it is used, silence can either facilitate or impede the interview process. Silence sometimes indicates the interviewer's passive acceptance. *Id.* at 37. At other times, it allows the interviewee to sort out that person's thoughts and feelings, thus demonstrating the interviewer's respect for the individual. Silence indicating the interviewee's confusion should be cut short, however, so that the confusion does not increase. An interviewee may show resistance by remaining silent; by accepting this form of resistance and not responding defensively, the interviewer may effectively break the silence. Benjamin, *supra* § 2.43, at 25.

The most direct way to elicit information is to ask questions. Yet too many questions may cause the interviewee to "clam up" or become defensive. When this happens, the interviewer should turn to supporting or accepting responses to put the interviewee at ease. Della-Piana, *supra*, at 21.

Interview questions can take many forms. Direct questions ask for information openly, whereas indirect questions ask for information without seeming to do so. Benjamin, *supra* § 2.43, at 66. Open-ended, friendly questions are most useful in getting information. Della-Piana, *supra*, at 21. The open-ended question allows the interviewee to answer freely, while a closed question limits the interviewee to a specific answer. Benjamin, *supra* § 2.43, at 64. Some closed questions include the answer in the question; these are not mere rhetorical questions, but they "assume the answer provided by the questioner is the answer the interviewee would provide had he really been asked." *Id.* at 65. Sometimes questions are asked in such a way as to make interviewees feel they must agree if they "know what's good" for them. *Id.* at 65–66. Studies have shown that the way a question is stated can influence the

interviewee's response. Jennifer Crocker, *Biased Questions in Judgment of Covariation Studies*, 8 Personality & Soc. Psych. Bull. 214, 218 (1982); Goodman, *supra* § 2.44, at 15; Sternberg, *supra* § 2.44, at 1135. Thus, the interviewer must be careful in phrasing questions. Double questions can be confusing to all involved; the interviewee does not know which question to answer first, and the interviewer may not know which question the interviewee is answering. Benjamin, *supra* § 2.43, at 67. It is preferable to ask questions one at a time. *Id.* at 69.

“Why?” is a question that deserves special attention. “Why?” connotes displeasure and disapproval and is perceived as probing. *Id.* at 78–80. However, the question can be perfectly benign when posed in a nonthreatening way merely to elicit needed information. *Id.* at 83–84.

D. A Checklist for the Interviewer [§ 2.46]

Over the past three decades, there has been extensive research related to the effects of the interviewer on the accuracy of information obtained from children. Whereas suggestive questioning techniques previously were sometimes thought to be required to elicit accurate information from reluctant children, research has now unequivocally demonstrated that the use of such techniques results in less accurate information. Below is a checklist for a guardian ad litem's use to assist in preparing for and conducting a quality child interview.

Be demonstrably nonjudgmental, both verbally and nonverbally, accepting everything the child says.

Do not suggest alternative response possibilities. Doing so will very likely influence the child's response.

Define the interview situation in a straightforward fashion at its outset.

Use clear, age-appropriate prompts to stimulate the child's concentration and increase the clarity of the child's responses.

Establish rapport, which is very important. Plan on spending as much time as necessary to do so. Do not try to hurry the interview or pressure the child to talk. For some children, particularly children in elementary or middle school and adolescents, going for a walk away from the house, for example, is a good way to facilitate open conversations, particularly in high-conflict situations.

Consider conducting the interview in a location that is familiar to the child. Conducting the interview at a park or the child's home or during a walk in the child's neighborhood likely will be much more comfortable for the child than doing so in a law office or court building.

Ask the child to bring to the interview something the child has made or earned. The child can then begin the interview by discussing something familiar. This should make the child feel freer later in the interview to offer opinions and descriptions in response to the interviewer's questions.

Use broad and open-ended questions as much as possible throughout the interview. Avoid more focused questions, including yes-or-no or multiple-choice questions, and, in particular, avoid suggestive questions.

Use carefully planned and rehearsed probing and follow-up questioning to enhance the clarity of the child's responses.

Plan how to return the child to a state of equilibrium following the interview. The interview is an intrusion into the child's life; its side effects must be anticipated and alleviated. Often, this can best be accomplished by returning to the material discussed during the initial rapport-building interaction. Asking the child what the child plans to do after the interview or the next day or talking about a favorite activity of the child can be a useful means for accomplishing this.

Assess your objectivity. Different interviewers will classify the same responses differently.

IX. Special Topics [§ 2.47]

A. COVID-19-Related Disruptions [§ 2.48]

The SARS-CoV-2 (COVID-19) pandemic had a profound effect on children and their well-being. Many youth were required to stop attending in-person school and suddenly convert to online learning strategies, some of which were more effective than others. When interviewing children who were of school age during the pandemic (including the 2019–20 and 2020–21 academic years), guardians ad litem should be sensitive to the effects of these educational changes, as well as the social isolation that often accompanied efforts to protect children from disease. Talking with parents and extended family members about ways that they and their children coped with pandemic restrictions may prove fruitful for the understanding of child and family dynamics. Many school-age youth turned more to online social media and gaming platforms as a substitute for in-person social contact. Exploring with youth and families how such online activities have continued to affect family interaction may prove enlightening.

B. Sexual Orientation and Gender Identity [§ 2.49]

There is increasing awareness of the presence of lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) youth. Youth that endorse alternative gender identities, in particular, are at increased risk for depression and suicidal behavior. Guardians ad litem are encouraged to be sensitive to the presence of such factors with the minor children with whom they work and to cautiously explore with parents their attitudes toward and reactions to such reports by the children.

C. Cell Phones and Other Electronic Communications Devices [§ 2.50]

The ubiquitous presence of cell phones and other electronic devices that allow children to communicate instantly with friends and family requires some additional consideration on the part of the guardian ad litem. For example, the guardian ad litem should consider the extent to which the children's parents safely manage such devices while also enabling the children to contact the "other parent" in a timely manner, if needed.

X. Appendices [§ 2.51]

A. Appendix 2A: Overview of Influential Theories of Human Development [§ 2.52]

Human development has been studied repeatedly by well-known (and not-so-well-known) researchers who have described developmental stages in various terms. Some delineate physical phases of growth, while others highlight sexual stages, learning stages, social stages, or stages in the development of language.

Sigmund Freud's stages of development, perhaps the most well known, are more concerned with sexual energy than they are with personality. Lidz, *supra* § 2.7, at 85. Freud called the first stage "oral"; the individual's primary focus at this phase is on sucking. The "anal" stage centers around bowel action, while the genitals are the focus of the "genital" or "oedipal" stage. It is in this last stage that the parent becomes a love object. Stella Chess et al., *Your Child Is a Person; A Psychological Approach to Parenthood Without Guilt* 6–7 (1965) [hereinafter Chess et al.].

Within Freud's theoretical system, development hinges on the child's successful progression through the different stages, which depends in turn on how the parents handle the child at each stage. *Id.* Mature sexuality is possible only if the child does not become fixated at an earlier stage.

In contrast, Jean Piaget's studies focused on cognitive development.

Freud emphasized emotional maturity as the desired prize, while Piaget emphasized reasoning. While Piaget was primarily concerned with regularities in growth of thought rather than with individual differences among children, Freud was preoccupied with the wishes, feelings, and fears of children and was interested in the personality differences among them.

Mussen et al., *supra* § 2.5, at 9.

During the first two years of life, Piaget said, intelligence is defined by the coordination of motor responses to stimulation; this is the "sensorimotor" stage. Egocentrism is the major characteristic of the "preoperational" stage (two to seven years of age); the egocentric child is unable to use any frame of reference (perceptual or experiential) other than the child's own. From ages 7 to 11, the

child is in the “concrete-operational” stage; concrete objects must be present in order for the child to perform intellectual operations. From ages 11 to 15, the “formal operational” stage, adult-like thinking is developed, encompassing a grasp of hypothetical and deductive reasoning, possibility, probability, and reality. Irene Athey, *Theories and Models of Human Development: Their Implications for the Education of Deaf Adolescents* 452–53 (working papers from the Int’l Symposium on Cognition, Educ. & Deafness, Wash., D.C., June 5–8, 1984). Piaget’s stages are continuous, with each one borrowing from the previous stage. Mussen et al., *supra* § 2.5, at 18.

In Piaget’s view, children continually try to make sense of their world by dealing actively with objects and people. From encounters with events, the child moves steadily from primitive motor coordinations toward several ideal goals, including the abilities: (1) to reason abstractly, (2) to think about hypothetical situations in a logical way, and (3) to organize mental actions or rules, which Piaget calls *operations*, into complex, higher order structures.

Id. at 16.

Erik Erikson delineated what he called the “eight ages of man.” These center around polarities representing the extremes of personality: (1) basic trust versus basic mistrust, (2) autonomy versus shame and doubt, (3) initiative versus guilt, (4) industry versus inferiority, (5) identity versus role confusion, (6) intimacy versus isolation, (7) generativity versus stagnation, and (8) ego integrity versus despair. Erik H. Erikson, *Childhood and Society* 247–74 (2d ed. 1963).

A fourth well-known theorist is Arnold Gesell, who concluded that the child’s state of maturity and adaptation to the environment are expressed in the child’s behavior. Chess et al., *supra*, at 19. He “identified cheerful stages, withdrawn stages, outgoing stages, friendly stages, negative and uncooperative stages, all of which, he believed, express the capacity of children to meet the social demands of the environment at a particular age.” *Id.* In addition, Gesell quantified language development in children as “jargon at 18 months, words at 2 years, and sentences at 3 years.” Gesell et al., *Child*, *supra* § 2.5, at 53.

Learning theorists believe that behavior can be explained in terms of an individual’s learning. Behavior can be changed, then, through new learning. “Learning represents the establishment of new associations—bonds or connections—between units that were not previously associated.” Mussen et al., *supra* § 2.5, at 22.

Another means for determining developmental stages is strictly by age. The typical stages are infancy (zero to 15 months), toddler, preschool (around two and a half or three), juvenile (off to school), adolescence, young adult (time for commitments), middle years (toward peak years and then away from them), old age, and death. Hershel Thornburg condensed these stages into three transitional periods: preadolescence, youth (transition between adolescence and adulthood), and transitional adulthood. These periods “are *all* social phenomena; that is, they exist because of the changing nature of the social structure and the evolution of the individual life structure in relation to it.” Thornburg, *supra* § 2.9, at 80.

B. Appendix 2B: Asking Children Questions [§ 2.53]

Interviewing a child properly is a complex process that requires careful preparation and consideration. Current child forensic interviewing models share a variety of similar components, all deemed important for obtaining accurate information. Depending on the specific model followed, the order of the components may vary. In general, however, the interviewing components are as follows:

- Establishment of rapport
- Introduction of interviewer and purpose of interview
- Rules and guidelines for the interview
- Eliciting from the child a promise to tell the only the truth or only talk about what is right
- Narrative event practice (practice interview)
- Transition to substantive portion of the interview

- Substantive portion of the interview
- Wrap-up

Each of these areas is further addressed below.

Establishment of Rapport: It is very important to establish proper rapport with the individual child. The early establishment of rapport during child forensic interviews has been associated with the responsiveness of children in the substantive phase of the interview and the richness of the information provided by the children. Irit Hershkowitz, *Socioemotional Factors in Child Sexual Abuse Investigations*, 14 Child Maltreatment 172 (2009). There is an emerging professional literature that addresses the issue of “reluctant reporters.” In recognition of the possibility of reluctance, some researchers recommend that interviewers pay careful attention to the issue of rapport, and they also suggest that if adequate rapport cannot be established, then the interview should be terminated and rescheduled. See, e.g., Irit Hershkowitz et al., *Changes in Interviewers’ Use of Supportive Techniques During the Revised Protocol Training*, 31 Applied Cognitive Psych. 340 (2017). Another group of scholars offers specific suggestions for the use of supportive and non-suggestive techniques for establishing rapport and providing emotional support during the interview. See Lamb et al., *supra* § 2.44. These techniques include addressing the child in a personal way, welcoming the child, expressing interest in the child, and making small gestures of goodwill. *Id.* at 169.

Introduction of the Interviewer and the Purpose of the Interview: Even older children might not be fully aware of the purpose of the guardian ad litem’s interview. Depending on what information, if any, has been provided to the child in advance of the interview (by a caregiver or other adult or even by a peer), the child might even have a misunderstanding of the nature of the interview. It is important to provide the child with an age-appropriate explanation for the meeting, as well as an explanation of the limits on confidentiality and privilege and the ways in which the information is likely to be used. In particular, in many cases, children may be reluctant to talk with the guardian ad litem if they believe that the information that they provide will be shared with a parent or guardian. Discussing such concerns at the outset of the interview will be important so as to facilitate provision of accurate information by the child. Older youth may be particularly concerned about the confidentiality of their statements.

Rules and Guidelines: Many children are socialized to be respectful to adults and not to disagree with or correct grown-ups. When interviewing children in a forensic context, however, it is important to ensure that the child knows that it is permissible and desirable to correct any misinformation or misunderstandings that the interviewer may have. The interviewer should let the child know that it is all right to say, “I don’t know,” instead of guessing; to correct the interviewer if a mistake is made; to ask for clarification if the child does not understand the question; and to talk about only the truth or what is real. In addition, letting the child know that the child, and not the guardian ad litem, is the expert in the subject matter to be discussed may help to improve the accuracy of the child’s statements.

Eliciting from the Child a Promise to Tell the Truth: The issue of eliciting a promise from the child to tell the truth is also quite important. Even very young children can provide accurate information during a properly conducted interview. Research has demonstrated that requiring a child to express an understanding of the difference between telling the truth versus telling a lie is likely not an accurate assessment of a young child’s ability to be truthful. It is important to note that in children’s language development the ability to understand what is being said (receptive language) usually precedes the ability to explain things (expressive language). Eliciting a promise from a child to tell the truth, or to talk only about what is right, has been demonstrated to be an effective way of ensuring increased reliability on the part of an interviewee. See, e.g., Thomas D. Lyon et al., *Young Children’s Competency to Take the Oath: Effects of Task, Maltreatment, and Age*, 34 L. & Hum. Behav. 141 (2010); Thomas D. Lyon & Angela D. Evans, *Young Children’s Understanding That Promising Guarantees Performance: The Effects of Age and Maltreatment*, 38 L. & Hum. Behav. 162 (2014).

Narrative Event Practice: When adults talk with children, it is generally a back-and-forth exchange. Adults ask questions, and children provide simple answers in response. Then the process repeats itself. People are socialized from a very young age to interact in this manner. When conducting a forensic interview with the child, however, research has repeatedly demonstrated that the most accurate information is obtained from a child using broad, open-ended questions. See Lamb et al., *supra* § 2.44, at 5. It is therefore important, when interviewing children to obtain accurate information, not only to encourage them to provide the interviewer with free narrative but also to practice that skill before the substantive portion of the interview. A common technique for doing so involves asking the child to explain to the interviewer everything that the child did on the day of the interview from the time that the child woke up until the meeting with the interviewer. Focusing on the various steps or events during the day, the interviewer can then assist the child in further reducing and explaining the details. For example, if a child reports that he woke up in the morning, brushed his

teeth, ate breakfast, and then met with the interviewer, the interviewer can have the child describe, step-by-step, each of those individual activities. This exercise teaches the child what the interviewer is seeking and can serve as a useful reference later in the interview (e.g., “Tell me what happened, just like you told me about what happened today before you met with me”).

Transition: Moving from the preliminary portions of the interview, described above, to the substantive portion of the interview, that is, whatever the interviewer is particularly interested in, requires that the interviewer do so in a way that is neither leading nor suggestive. For example, a guardian ad litem who is interested in exploring reports of domestic violence in the child’s home should not transition to the topic by saying something like, “Tell me what you see when your parents fight.” Instead, asking broad, open-ended questions is much more likely to elicit relatively accurate information and a larger quantity of information. For example, saying “Tell me all about your mom,” followed by “Tell me all about your dad,” broaches the topic without unduly influencing the child’s responses. Following up with responses such as “Tell me more about _____” or “And then what happened?” is also appropriate. The use of yes-or-no or multiple-choice questions or questions that otherwise suggest specific responses should be avoided.

Wrap-up: Many children will find talking with the guardian ad litem about troubling personal or family circumstances to be difficult and perhaps upsetting. It is important for the guardian ad litem to try to end the interview when the child is in a positive mood, as opposed to terminating the interview when the child may be upset. Returning to items brought up by the child during the rapport-building phase, such as the child’s interests, sports activities, or other neutral topics, is a useful technique to achieve this goal.

C. Appendix 2C: Reference List [§ 2.54]

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Chapter 3

Family Court: Wis. Stat. Ch. 767

[Kate A. Neugent](#)

I. Scope [§ 3.1]

This chapter presents an overview of the role, duties, and powers of the guardian ad litem (GAL) in actions affecting the family.

Note. The term “guardian ad litem” and the abbreviation “GAL” are used interchangeably throughout this chapter.

The chapter begins with a discussion of when, and in what situations, a guardian ad litem is necessary in family court, and includes a discussion of a guardian ad litem’s general duties in family court. The chapter also provides information about training and qualifications, obtaining appointments, and being paid for those appointments. Further, the chapter offers some insight into how the guardian ad litem should approach specific kinds of actions, such as custody, physical placement, and paternity.¹

An action affecting the family, see [Wis. Stat.](#) § 767.001(1); *infra* § [3.2](#), may have very serious implications for the minor children in that family. The guardian ad litem should be aware that in addition to enduring the effects of the action affecting the family, children may also be suffering from the effects of family violence, drug or alcohol abuse issues, and mental illness in the family. For more information, see [chapter 2](#), *supra*. See also Tess Meuer & Kathryn Webster, *Effects of Domestic Abuse on Child Witnesses*, in *Wiley Family Law Update* 201 (1997); Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 Clearinghouse Rev. 1113 (Apr. 1996). The parents might not be able to agree on basic issues such as legal custody or physical placement. Although both parents may insist that they have the best interests of their children in mind, these interests must nonetheless be protected and promoted by independent counsel—a guardian ad litem.

II. When a Guardian ad Litem Is Necessary [§ 3.2]

Before the 1971 enactment of the predecessor to [Wis. Stat.](#) § 767.407, circuit courts had no clear direction about when a guardian ad litem was necessary. The decision to appoint a guardian ad litem was left to the circuit court’s discretion with the suggestion from the Wisconsin Supreme Court that a guardian ad litem be appointed in those instances in which reliance on the parties and the investigation of a welfare agency might not produce all the important evidence that the court should consider in looking after the children’s “best interests.” See *Dees v. Dees*, [41 Wis. 2d 435](#), [164 N.W.2d 282](#) (1969); *Wendland v. Wendland*, [29 Wis. 2d 145](#), [138 N.W.2d 185](#) (1965).

[Wis. Stat.](#) § 767.407(1) now directs when a guardian ad litem is to be appointed for minor children in family law cases:

(a) The court *shall* appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:

1. The court has reason for special concern as to the welfare of a minor child.
2. Except as provided in par. (am), the legal custody or physical placement of the child is contested.

(am) The court is not required to appoint a guardian ad litem under par. (a) 2. if all of the following apply:

1. Legal custody or physical placement is contested in an action to modify legal custody or physical placement under [\[Wis. Stat. §\] 767.451](#) or [767.481](#).

2. The modification sought would not substantially alter the amount of time that a parent may spend with his or her child.
3. The court determines any of the following:
 - a. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.
 - b. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.
- (b) The court *may* appoint a guardian ad litem for a minor child in any action affecting the family if the child's legal custody or physical placement is stipulated to be with any person or agency other than a parent of the child or, if at the time of the action, the child is in the legal custody of, or physically placed with, any person or agency other than the child's parent by prior order or by stipulation in this or any other action.
- (c) The attorney responsible for support enforcement under [\[Wis. Stat. §\] 59.53\(6\)\(a\)](#) may request that the court appoint a guardian ad litem to bring an action or motion on behalf of a minor who is a nonmarital child whose paternity has not been conclusively determined from genetic test results under [\[Wis. Stat. §\] 767.804](#), acknowledged under [\[Wis. Stat. §\] 767.805\(1\)](#) or a substantially similar law of another state, or adjudicated for the purpose of determining the paternity of the child, and the court shall appoint a guardian ad litem, if any of the following applies.
 1. Aid is provided under [\[Wis. Stat. §\] 48.57\(3m\)](#) or (3n), 48.645, 49.19, or 49.45 on behalf of the child, or benefits are provided to the child's custodial parent under [\[Wis. Stat. §§\] 49.141 to 49.161](#), but the state and its delegate under [\[Wis. Stat. §\] 49.22\(7\)](#) are barred by a statute of limitations from commencing an action under [\[Wis. Stat. §\] 767.80](#) on behalf of the child.
 2. An application for legal services has been filed with the child support program under [\[Wis. Stat. §\] 49.22](#) on behalf of the child, but the state and its delegate under [\[Wis. Stat. §\] 49.22\(7\)](#) are barred by a statute of limitations from commencing an action under [\[Wis. Stat. §\] 767.80](#) on behalf of the child.
- (d) A guardian ad litem appointed under par. (c) shall bring an action or motion for the determination of the child's paternity if the guardian ad litem determines that the determination of the child's paternity is in the child's best interest.
- (e) Nothing in this subsection prohibits the court from making a temporary order under [\[Wis. Stat. §\] 767.225](#) that concerns the child before a guardian ad litem is appointed or before the guardian ad litem has made a recommendation to the court, if the court determines that the temporary order is in the best interest of the child.

(Emphasis added.)

Typically, a guardian ad litem is appointed in the following proceedings: (1) in a divorce action in which legal custody or physical placement is an issue, [Wis. Stat. § 767.001\(1\)\(c\)](#), (e); (2) in an action concerning physical placement or visitation rights to children, [Wis. Stat. § 767.001\(1\)\(k\)](#); and (3) in an action to determine paternity, [Wis. Stat. § 767.001\(1\)\(L\)](#). [Wis. Stat. §§ 891.39 and 767.82](#) determine when in the proceedings a guardian ad litem must be appointed in paternity actions. Further, a guardian ad litem is appointed in motions brought under [Wis. Stat. § 767.451](#) to revise previously entered judgments with respect to custody or physical placement, unless [Wis. Stat. § 767.407\(1\)\(am\)](#) applies. The [Wis. Stat. § 767.407\(1\)\(am\)](#) exceptions are addressed in section [3.26, infra](#). A guardian ad litem is also appointed when an issue arises regarding the relocation of a child's residence under [Wis. Stat. § 767.481](#), unless [Wis. Stat. § 767.407\(1\)\(am\)](#) applies.

The language of [Wis. Stat. § 767.407\(1\)\(a\)1.](#) regarding “special concern as to the welfare of a minor child” is not clearly defined. The court in *Bahr v. Galonski*, [80 Wis. 2d 72](#), 82, [257 N.W.2d 869](#), 874 (1977), said that the “special concern” test is qualitative rather than quantitative and thus the circuit court must look to the *nature* of the interests—e.g., periods of physical placement—affected by the action, rather than their *magnitude*, when determining whether the appointment of a guardian ad litem is necessary. That neither party requests a guardian ad litem is irrelevant. *Biel v. Biel*, [114 Wis. 2d 191](#), 196–97, [336 N.W.2d 404](#) (Ct. App. 1983).

A pending action is a prerequisite to the appointment of a guardian ad litem. In *Jocius v. Jocius*, [218 Wis. 2d 103](#), [580 N.W.2d 708](#) (Ct. App. 1998), a letter purportedly written by three minor children of a divorced couple was sent to the original circuit court judge. By the time the court received that letter, however, the judge had retired and passed away. After the judge who was handling the

original judge's caseload read the letter, he appointed a guardian ad litem for the minor children. Several actions were initiated as a result. In a footnote, the court of appeals stated, "[w]hile we share the trial court's concern for the welfare of young children, we feel it unwise to appoint a guardian ad litem for children in a divorce action several years after the divorce has been granted when there is no pending litigation." *Id.* at 107 n.2. The court further cautioned circuit court judges that similar actions may run afoul of supreme court rules governing ex parte communications. *Id.*

In the majority of cases, one guardian ad litem will be appointed to represent all the marital children; however, occasionally, when the interests of siblings are incompatible, it may be necessary to appoint more than one guardian ad litem. *See de Montigny v. de Montigny*, 70 Wis. 2d 131, 140, 233 N.W.2d 463 (1975). The guardian ad litem must be sure that all the children can be represented without any of them being shortchanged. *See Riemer v. Riemer*, 85 Wis. 2d 375, 270 N.W.2d 93 (Ct. App. 1978).

Caution. Although conflicts of interest might not be obvious at the outset, the guardian ad litem appointed to represent more than one child should be aware of the potential for such conflicts and should be prepared to bring the conflicts to the court's attention. Conflicts are particularly likely between stepsiblings or in any case in which some of the children to the action are the children of only one litigant and others are the children of both.

III. Role, Duties, and Powers of the Guardian ad Litem [§ 3.3]

A. In General [§ 3.4]

Because many actions affecting the family involve custody and physical placement of children, the guardian ad litem appointed to represent the children's best interests plays a crucial role in the process. In cases involving intimate-partner violence or coercive behavior, when one partner is less able to advocate even for that individual's own needs, having a guardian ad litem evaluate and advocate for the children's needs is even more crucial. The supreme court has recognized that minor children are "interested and affected parties" in actions affecting the family, *Wendland v. Wendland*, 29 Wis. 2d 145, 157, 138 N.W.2d 185, 191 (1965), and "must be represented in their own capacity as parties," *de Montigny v. de Montigny*, 70 Wis. 2d 131, 140, 233 N.W.2d 463 (1975). However, when holding that a minor child is not entitled to intervene as a party in a divorce action through independent counsel, the court of appeals concluded that the appointment of a guardian ad litem fulfills the child's right to be represented in actions affecting the family. *Joshua K. v. Nancy K.*, 201 Wis. 2d 655, 549 N.W.2d 494 (Ct. App. 1996).

The appointment of a guardian ad litem is the only entitlement a minor child has to participate and have the minor's best interest represented in actions affecting the family. Therefore, it is important that the guardian ad litem have a thorough understanding of the GAL's role, duties, and powers. The basic statutory grant of authority to the guardian ad litem is found in [Wis. Stat. § 767.407\(4\)](#); however, there is no simple statutory checklist available to provide guidance in all situations.

The Family Law Section of the State Bar of Wisconsin issued practice guidelines for guardians ad litem practicing in family court. The guidelines provide standards of practice for the prospective guardian ad litem. These guidelines have been updated (most recently in 2023) and can be accessed by members of the State Bar of Wisconsin's Family Law Section, through the "Section Member File Cabinet," <https://www.wisbar.org/formembers/groups/sections/FamilyLawSection/Pages/Section-Member-File-Cabinet.aspx> (click "GAL Resource Guide 2023" hyperlink; then follow "GAL Practice Guidelines Book - FINAL 2023" hyperlink).

B. Guardian ad Litem as Advocate [§ 3.5]

According to [Wis. Stat. § 767.407\(4\)](#), "[t]he guardian ad litem shall be an *advocate* for the best interests of a minor child." (Emphasis added.)

[Wis. Stat. § 767.407\(4\)](#) clarifies the guardian ad litem's responsibilities, emphasizing that the guardian ad litem must be an advocate for the best interests of a minor child and must function "independently, in the same manner as an attorney for a party to the action." [Wis. Stat. § 767.407\(4\)](#) specifically states that "[t]he guardian ad litem has none of the rights or duties of a general guardian." According to the Judicial Council note that accompanied the 1990 revision of the former [Wis. Stat. § 767.045](#), now revised and renumbered as [Wis. Stat. § 767.407](#), *see* 2005 Wis. Act 443, § 25 (eff. Jan. 1, 2007):

[T]his means that the guardian ad litem communicates with the court and other lawyers in the same manner as a lawyer for a party, presents information on relevant issues through the presentation of evidence or in other appropriate ways and generally functions as the lawyer for a

party. In this case, the “party” is the best interests of the children.

[Wis. Stat.](#) § 767.407 Judicial Council committee note—1990. The relevant revision of [Wis. Stat.](#) § 767.045—later revised and renumbered as [Wis. Stat.](#) § 767.407 and so identified in this chapter—was promulgated in 1989 but took effect on January 1, 1990, and is referred to in this chapter as the “1990 revision.”

The supreme court, in 1977, stated that the guardian ad litem serves a twofold purpose: (1) to serve as an advocate and legal representative to protect and advance the best interests of the children; and (2) to act as a representative appointed to counsel and consult with the trial judge concerning custody. *Allen v. Allen*, [78 Wis. 2d 263](#), [254 N.W.2d 244](#) (1977). The revision of the statute in 1990, however, along with a subsequent court of appeals decision, eliminated the second purpose because of the ethical restrictions and limitations on the type of contact an attorney in litigation may have with the judge. See [SCR 20:3.5\(b\)](#); *Hollister v. Hollister*, [173 Wis. 2d 413](#), [496 N.W.2d 642](#) (Ct. App. 1992).

While the 1990 revision of the guardian ad litem appointment statute clarified that a guardian ad litem must not have contact or communication with the judge in any way that would be inappropriate for other attorneys, it is nevertheless true that the guardian ad litem’s role in the judicial system affords the guardian ad litem a level of protection not extended to other counsel. In *Paige K.B. v. Molepske*, [219 Wis. 2d 418](#), [580 N.W.2d 289](#) (1998), the supreme court stated that the guardian ad litem’s role is intimately related to the judicial process and that the guardian ad litem “essentially functions as an agent or arm of the court, charged with the same standard that must ultimately govern the court’s decision—the best interests of the child.” *Id.* at 430. The supreme court held that “[a guardian ad litem] appointed by the circuit court under [Wis. Stat.](#) § 767.045 [now [Wis. Stat.](#) § 767.407] is absolutely immune from negligence liability for acts within the scope of that [guardian ad litem]’s exercise of his or her statutory responsibilities.” *Id.*

Practice Tip. A guardian ad litem’s immunity from negligence liability does not excuse the GAL from violations of the rules of professional conduct for attorneys. Complaints regarding guardian ad litem performance can be referred to the Office of Lawyer Regulation, and an attorney acting as guardian ad litem should take care to fulfill the obligations of the job comprehensively and ethically. See *infra* § [3.13](#).

This principle set forth in [Wis. Stat.](#) § 767.407(4) that the guardian ad litem is intended to be an advocate for the best interests of a minor child has been expanded upon by the supreme court in several cases. In *Bahr v. Galonski*, [80 Wis. 2d 72](#), [257 N.W.2d 869](#) (1977), the court stated that children are best served by the presence of a vigorous advocate free to consult at length with the children, investigate, marshal evidence, and subpoena and cross-examine witnesses. The guardian ad litem must be an active advocate, not merely a nominal representative.

Similarly, in *de Montigny v. de Montigny*, [70 Wis. 2d 131](#), [233 N.W.2d 463](#) (1975), the court stated that the guardian ad litem, as counsel to a party in interest, has the *right and obligation* to interview clients, to make such investigation as the guardian ad litem considers appropriate, to call witnesses on behalf of the children, and to cross-examine other witnesses. The guardian ad litem has all the duties and powers of counsel who represents a party in litigation and must act in accordance with the standards of professional responsibility. *Id.* at 141. Moreover, these rights, duties, and powers do not terminate at the trial level but continue on appeal. *Marotz v. Marotz*, [80 Wis. 2d 477](#), [259 N.W.2d 524](#) (1977); see also [Wis. Stat.](#) § 767.407(5). Nominal representation that fails to ensure that children are treated as parties to the action is insufficient and constitutes a breach of professional duties.

The court of appeals has held that the import of the Judicial Council note to the guardian ad litem appointment statute is to preclude the guardian ad litem from counseling or consulting with the judge in a manner different from an attorney for any other party. *Hollister*, [173 Wis. 2d 413](#). According to the court, [Wis. Stat.](#) § 767.407 “states clearly that the guardian ad litem is to function as an attorney.” *Id.* at 420.

The court of appeals in *Hollister* also noted that although “in general, the role of the guardian ad litem is not well-defined,” the plain language of [Wis. Stat.](#) § 767.407 prohibits a guardian ad litem from being called as a witness. *Id.* at 418–19. The court stated:

[SCR 20:3.7](#) states that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” Consequently, if a guardian ad litem were to be called as a witness, [SCR 20:3.7](#) would mandate that the guardian resign as advocate for the best interests of the child....

We conclude under the plain language of the statute that a guardian ad litem appointed under sec. 767.045, Stats. [now [Wis. Stat.](#) § 767.407], may not be called as a witness in a custody proceeding, and therefore may not be cross-examined.... The attorney acting as guardian ad litem

for the child's best interests is to be treated as any other attorney acting as an advocate for a party in the proceeding.

Id.

The court in *Hollister* emphasized its position that any report or oral recommendation issued by the guardian ad litem must not contain factual information that is not part of the record. *Id.* at 420. Finally, to avoid the appearance that a guardian ad litem is a witness or on a fact-finding mission, the court suggested that the guardian ad litem's preliminary report be viewed as an attorney's brief, and that the guardian ad litem's oral recommendation be viewed as an attorney's final argument. *Id.* at 420–21.

A guardian ad litem's responsibility to advocate for the child's best interest may also extend beyond the proceeding for which the GAL was appointed. For example, *David S. v. Laura S. (In the Interest of Brandon S.S.)*, [179 Wis. 2d 114](#), [507 N.W.2d 94](#) (1993), concerned a situation in which two guardians ad litem had been appointed under different statutes. A guardian ad litem in Dane County had been appointed under the predecessor to [Wis. Stat. § 767.407](#) in an action affecting the family. A guardian ad litem also had been appointed in Waupaca County under [Wis. Stat. § 48.235](#), relating to a termination of parental rights (TPR) and adoptive placement proceeding. The court stated:

No statutory provision prohibits a guardian ad litem appointed under one chapter of the statutes or appointed by one circuit court from acting in a proceeding brought under another chapter of the statutes or in another circuit court. The very phrase “guardian ad litem,” however, implies that the person's power is limited to the proceeding for which [the person] was appointed. Yet advocating for the child's best interests in a particular proceeding may necessitate taking action with respect to another lawsuit.

Id. at 129 (footnote omitted).

Because there were proceedings for TPR and adoptive placement in Waupaca County, the court in *David S.* determined that the minor child's “legal custody, physical placement and support” were clearly affected and that, as a result, under the Family Code's guardian ad litem appointment statute (now [Wis. Stat. § 767.407](#)), the Dane County guardian ad litem had a responsibility to advocate for the minor child beyond the proceedings for which she had been appointed. *Id.* at 130. The court further stated:

In light of the legislative policy of protecting the best interests of the child and the responsibility of the guardian ad litem to be an advocate for the best interests of the child, we conclude that the guardian ad litem's responsibility under sec. 767.045 [now [Wis. Stat. § 767.407](#)] is to do whatever a prudent attorney “would recommend to a competent adult client in the same situation.”

Id. (footnote omitted).

C. Best Interest of the Child Versus Wishes of the Child [§ 3.6]

[Wis. Stat. § 767.407\(4\)](#) further provides that, “[u]nless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under [\[Wis. Stat. §\] 767.41\(5\)\(am\)2.](#)” The guardian ad litem is not bound, however, by the child's wishes. [Wis. Stat. § 767.407\(4\)](#). In *Wiederholt v. Fischer*, [169 Wis. 2d 524](#), [485 N.W.2d 442](#) (Ct. App. 1992), the husband argued, and the court agreed, that the guardian ad litem misunderstood his duties, which the guardian ad litem described as representing and advocating the children's wishes. The court of appeals stated:

In the appellate brief, [the guardian ad litem] stated that the children are his “clients.” However, sec. 767.045(4), Stats., [now [Wis. Stat. § 767.407\(4\)](#)] clearly states that the guardian ad litem shall be an advocate for the *best interests* of a minor child and that the guardian ad litem shall not be bound by the wishes of the minor child. This means that the guardian ad litem does not represent a child *per se*. Rather, the guardian ad litem's statutory duty is to represent the *concept* of the child's best interest. In advocating for this concept, the guardian ad litem acts in the “same manner as an attorney for a party to the action.” *Id.* Advocating this concept may require advocating something contrary to the child's wishes. By concentrating on the child's wishes, the guardian ad litem may miss his or her obligation—to fully examine and advocate the child's best interest. To fulfill the statutory obligation, the guardian ad litem must see himself or herself as representing the concept of the child's best interest.

Id. at 536–37.

Practice Tip. Despite the statutory requirement that the court take into consideration the child's wishes in determining legal custody and physical placement, the statutes do not specify how those wishes are to be communicated. Rather, the statute indicates

that the best wishes may be communicated by the child, the child's guardian ad litem, or another appropriate professional. [Wis. Stat. § 767.41\(5\)\(am\)2](#). Possible options include (1) presenting this information through the testimony of the family court counselor, (2) expressing the child's wishes through the child's individual counselor, (3) making an offer of proof to the court as the guardian ad litem, or (4) as a last resort, bringing the child to the judge's chambers.

Caution. The guardian ad litem should seriously consider the potential effects on parent-child relationships when determining how to communicate a child's wishes to the court. Parent-child relationships and the child's safety must be protected whenever possible. The guardian ad litem should be particularly cautious about bringing a child to the judge's chambers. In addition to that experience being potentially frightening for a child, it may be difficult to ascertain the child's wishes when the child is being pressured to choose between parents. *See generally supra ch. 2*. An article written by attorney Gretchen Viney contains an extensive discussion of this issue. Gretchen Viney, *Children as Witnesses in Family Court*, 26 Wis. J. Fam. L. 65 (July 2006), <https://repository.law.wisc.edu/s/uwlaw/media/38142>.

D. Recommendation by the Guardian ad Litem and Initial Determination by the Court [§ 3.7]

Ultimately, in advocating for the child's best interests, the guardian ad litem's job is to present a recommendation to the court so that the court may then make an informed initial determination regarding custody and physical placement of the minor children. *Legal custody* means "the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." [Wis. Stat. § 767.001\(2\)\(a\)](#); *see also* [Wis. Stat. §§ 767.001\(6\)](#) (sole legal custody), [767.001\(1s\)](#) (joint legal custody). *Physical placement* means "the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody." [Wis. Stat. § 767.001\(5\)](#).

The guardian ad litem should be aware that [Wis. Stat. § 767.41](#) provides specific factors to consider in determining best interests and sets out the options available to the court with respect to awarding custody and allocating periods of physical placement. For example, [Wis. Stat. § 767.41\(2\)](#) permits the court to order sole legal custody if both parties agree to sole legal custody with the same party or, in certain circumstances, if only one party requests it and certain other conditions are met. For standards in cases involving change of custody or physical placement, see section [3.26, infra](#); for standards in cases involving relocating and establishing a residence with a minor child of the parties more than 100 miles from the residence of the other party, see section [3.27, infra](#).

[Wis. Stat. § 767.41\(5\)](#) sets forth the factors that the court must consider when applying the best-interest standard and determining legal custody and periods of physical placement. The court must consider "all of" the factors in [Wis. Stat. § 767.41\(5\)\(am\)1–14](#). when making its determination, and the factors "are not necessarily listed in order of importance." [Wis. Stat. § 767.41\(5\)\(am\)](#). In addition, "[t]he court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian." *Id.* When representing children, the guardian ad litem must use these same factors and considerations as guidelines. [Wis. Stat. § 767.407\(4\)](#).

[Wis. Stat. § 767.43](#) lists the court's required considerations with respect to a petition for third-party visitation. Visitation rights are reserved for "a grandparent, great grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child." [Wis. Stat. § 767.43\(1\)](#). For a discussion of third-party visitation rights, see *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, [193 Wis. 2d 649](#), [533 N.W.2d 419](#) (1995) (granting biological mother's same-sex former partner opportunity to seek visitation with child raised by biological mother and former partner).

The guardian ad litem, as an advocate, must be prepared to prove what the guardian ad litem believes to be in the best interests of the child or children; the guardian ad litem should do so by offering proof and evidence that the various factors set forth in the applicable statute have each been considered and overall support their position.

The guardian ad litem has further duties when cases involving contested legal custody or physical placement are mediated. *See supra* §§ [3.4–6](#). Guardians ad litem appointed before or during mediation must certify that they have reviewed the mediation agreement and must comment on the agreement based on the best interest of the child. [Wis. Stat. § 767.405\(12\)\(a\)](#). In addition, the guardian ad litem must participate when any action in which the guardian ad litem is involved is handled by other forms of alternative dispute resolution, such as arbitration and settlement conferences. *See* [Wis. Stat. § 802.12\(3\)](#).

Thus, the guardian ad litem's role in the court's initial determination is not a passive one. An independent investigation must be made so that an independent opinion can be formed. The guardian ad litem's duties are not met by merely rubber-stamping the opinion of the family court counseling service or of the social worker in the case. For information pertinent to the guardian ad litem's formulating an opinion, including discussion of child development, effects of divorce on children, and custody and physical placement considerations that the guardian ad litem should take into account, see [chapter 2](#), *supra*.

The guardian ad litem has the duty to make recommendations to the court and should not keep their recommendation secret until trial. A guardian ad litem should convey any recommendations orally to counsel and the parties in advance of the hearing. Unless ordered by the court, a guardian ad litem should *not* submit a written report to the parties or counsel except in the form of a pretrial brief. Final recommendations must be supported by evidence included in the record.

E. Authority Created by Court Order or by Parties' Stipulation [§ 3.8]

1. In General [§ 3.9]

The statutory responsibilities of the guardian ad litem, as described in sections [3.4–.7](#), *supra*, are to advocate for the child's best interests and to ensure that the court is aware of the child's wishes. However, in at least some counties, guardians ad litem in family court semi-regularly receive temporary or postjudgment decision-making authority. This can occur by court order, such as a guardian ad litem appointment order providing that the guardian ad litem has the authority to make changes in the temporary placement schedule, subject to the right of either party to object and request a hearing or subject to stipulation of the parties. Some attorneys are concerned about the court's delegation of authority to the guardian ad litem, and some attorneys believe that a guardian ad litem should not accept such authority. Such objections notwithstanding, the practice does occur in counties such as Milwaukee, Waukesha, and Dane Counties, largely because the guardian ad litem is often in the best position to assess the children's needs and efficiently address problem areas in the family's arrangements for the children.

The question whether authority can be appropriately delegated to the guardian ad litem was partially answered by the court of appeals in *Lawrence v. Lawrence*, [2004 WI App 170](#), [276 Wis. 2d 403](#), [687 N.W.2d 748](#). This decision confirmed the authority of a circuit court to approve and then enforce a stipulation delegating postjudgment decision-making authority to a guardian ad litem. In *Lawrence*, the parties' marital settlement agreement provided that, if the parents could not agree, the guardian ad litem and the family court counselor would have the authority to decide where the parties' child, who was turning five and entering kindergarten shortly after the divorce was finalized, would attend school. The parents could not agree, and the guardian ad litem and counselor, as contemplated by the parties' settlement agreement and subsequent judgment, decided on a school for the child. The nonprevailing party then sought circuit court review of that decision. The circuit court found that it lacked authority to review the choice-of-school decision, based on the parties' stipulation to defer to the guardian ad litem and the family court counselor regarding that issue.

The court of appeals in *Lawrence* held that the delegation of specific decisions to a guardian ad litem and family court counselor, by stipulation of the parties, is a permissible dispute-resolution mechanism. The court specifically held that it is consistent with the public policy in favor of promoting settlement of family disputes and does not deprive the child or either parent of the protections contained in the Family Code. As a practical matter, a guardian ad litem may wish to be cautious about the extent to which the GAL agrees to accept such decision-making authority, but there is a basis to support the exercise of authority by the guardian ad litem when the parties have agreed to it.

2. Practice Tips [§ 3.10]

a. Decision-Making in Pending Cases [§ 3.11]

When asked to make decisions regarding placement or custodial issues during the pendency of an action, the guardian ad litem should be aware of several risks. Information regarding a family situation and the strengths and weaknesses of the parents rarely reveals itself immediately. Making a recommendation early in the process, therefore, often means making a decision based on incomplete data. Most thorough investigations will continue to uncover relevant information, and it is important to acknowledge the distinct possibility that the situation may turn out to be more complicated than the initial impression. A guardian ad litem who has to make an early interim recommendation, particularly when that recommendation is central to a temporary order or interim hearing, risks becoming invested in that position and being unable to accurately evaluate subsequent information that does not support the initial position. A guardian ad litem making interim decisions also risks being perceived, by either or both parties, as biased. When

exercising interim decision-making, therefore, the guardian ad litem should maintain a conscious focus on continuing to evaluate the case and explore additional information.

Practice Tip. In advance of making an interim recommendation, the guardian ad litem should discuss these concerns with the parties and counsel; the guardian ad litem should reassure them that the GAL is aware of the problems inherent in an early decision and intends to continue to collect additional data and review any new information with a neutral perspective.

In addition, a guardian ad litem who is willing to be responsible for initial decisions during the pendency of a case risks being drawn into situations in which the guardian ad litem is expected to micromanage highly dysfunctional family units. Although in some cases the guardian ad litem can reduce conflict and create positive improvements that serve the best interests of the child, many of these families will convert the guardian ad litem's office into an extension of their battleground. The guardian ad litem should be very careful in these cases to maintain focus on the primary role of the guardian ad litem as a legal advocate for the child's best interests.

b. Involvement in Post-Litigation Situations [§ 3.12]

In cases in which specific issues are anticipated to continue beyond the entry of the final stipulation or order, a guardian ad litem may be asked to remain involved for the purpose of resolving issues or monitoring compliance with the terms of the final order. The court and the guardian ad litem should consider these situations with extreme caution. Any such order should include clear provisions about the duration of the ongoing involvement (the shorter the better, but definitely no longer than a year), the manner in which the guardian ad litem is to receive information, the nature of the guardian ad litem's authority, payment, and the circumstances under which the guardian ad litem can request to be discharged.

In addition, even in cases in which there is no continuing appointment or authority, parents frequently contact the prior guardian ad litem for advice or assistance in handling post-litigation problems. The guardian ad litem should be aware of the risks inherent in accepting continued calls from parents or family members in these circumstances. There is no appointment, no payment, and no qualified immunity with respect to actions taken in this circumstance. The best way to avoid problems is to restrict any post-litigation conversations to a reminder that there is no ongoing case and thus no ongoing appointment; direct that the parent confer with counsel and file a motion, if appropriate; and take no actions beyond providing copies of documents from the file if the parent needs paperwork from the period when the appointment was active.

F. Ethical Obligations of a Guardian ad Litem [§ 3.13]

The Rules of Professional Conduct for Attorneys, contained in [SCR](#) ch. 20, include a specific ethics rule regarding guardians ad litem, which reads as follows:

A lawyer appointed to act as a guardian ad litem or as an attorney for the best interests of an individual represents, and shall act in, the individual's best interests, even if doing so is contrary to the individual's wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct that are consistent with the lawyer's role in representing the best interests of the individual rather than the individual personally.

[SCR](#) 20:4.5.

Because the client for a guardian ad litem is the "best interest of the ward," the standard protocol for resolving conflict issues is less helpful. Guidance on how to address a conflict of interest for a guardian ad litem can be found in the statutes and case law, in addition to the rules. A description of how selected rules may apply to GALs is set forth in detail in an ethics opinion revised in 2024. State Bar of Wis. Comm. on Pro. Ethics, Formal Op. EF-23-02 (revised Feb. 6, 2024). The most significant takeaway from the opinion is that

[i]f a conflict of interest arises which requires informed consent from the GAL's client, the "best interest of the ward", the conflict should be brought to the Court's attention, as the court is in the best position to determine whether to permit the GAL to proceed in lieu of obtaining informed consent from the "best interests of the ward."

Id.

Further, it is important for the guardian ad litem to remember there are two significant differences between representing one of the parties and representing the “best interests of the ward.” In addition to the ward not being able to give informed consent to waive a potential conflict, when representing the “best interests of the ward” there is no attorney-client privilege or duty of confidentiality, as would normally be provided in [SCR 20:1.6](#). However, there are limitations to be aware of when accepting an appointment as GAL. [SCR 20:1.6\(a\)](#) states that lawyers may make “impliedly authorized” disclosures that are necessary to competently represent their clients; however, they may not make disclosures that are not required by their responsibilities to competently represent the best interests of their ward. It is imperative that a guardian ad litem be cautious when choosing to make disclosures and to reflect on whether the disclosure is truly necessary to advance a child’s best interests.

Practice Tip. In conversations with an older child for whom an attorney is appointed to serve as guardian ad litem, it is appropriate to address that the child does not have any attorney-client privilege. The child should understand that the guardian ad litem might not be able to keep all comments by the child to the guardian ad litem confidential.

Practice Tip. It is important to note that the lawyer who acts as a guardian ad litem is not subject to the same communication obligations as are contained in [SCR 20:1.4](#) for advocate counsel. Nevertheless, a guardian ad litem should be responsive in communicating about the status of the GAL’s work with the court and the parties.

IV. Appointment [§ 3.14]

A. Training Requirements and Obtaining Appointments [§ 3.15]

The most effective way by which an attorney may be appointed as a guardian ad litem is to make the attorney’s interest in serving as a guardian ad litem known to the family court judges and circuit court commissioners who make the appointments. The attorney wishing to serve as a guardian ad litem should send a letter to the family court judges and commissioners expressing the attorney’s interest in serving and indicating that the attorney has met all continuing legal education (CLE) or other training requirements for guardians ad litem. In addition, some counties, for example Dane County and Milwaukee County, maintain a list of attorneys who are willing to accept an appointment as a guardian ad litem. If an attorney wishes to have the attorney’s name placed on such a list, the attorney should contact the clerk of court for the county or counties in which the attorney practices and complete any required application for the county.

[SCR 35.015](#) applies to guardian ad litem appointments in actions affecting the family under [Wis. Stat.](#) ch. 767. Under this rule, an attorney may not accept an appointment as a guardian ad litem unless one or more of the following conditions has been met:

- (1) For a lawyer’s first appointment commencing on or after January 1, 2021, the lawyer has attended at least 9 hours of guardian ad litem education approved under [SCR 35.03](#) during the combined current reporting period specified in [SCR 31.01\(7\)](#) and the immediately preceding reporting period. The 9 hours shall be allocated as follows:
 - (a) At least 3 of the 9 hours shall be approved education addressing the topic of family violence.
 - (b) In addition to the requirement of (1)(a), at least 3 of the 9 hours shall be approved education on any topic identified in [SCR 35.03\(1m\)\(a\)](#).
 - (c) The remaining 3 hours may be any type of approved “guardian ad litem” or “family court guardian ad litem” education.
 - (1m) After a lawyer has satisfied the initial 9 credit threshold in 35.015(1) and for any subsequent appointments, the lawyer has attended at least 6 hours of guardian ad litem education approved under [SCR 35.03](#) during the combined current reporting period specified in [SCR 31.01\(7\)](#) and the immediately preceding reporting period. The 6 hours shall be allocated as follows:
 - (a) At least one of the 6 hours shall be approved education on the topic of family violence.
 - (b) In addition to the requirement of [SCR 35.015\(1m\)\(a\)](#), at least 2 more of the required 6 hours shall be approved education on any of the topics identified in [SCR 35.03\(1m\)\(a\)](#).
 - (c) The remaining hours can be any type of approved “guardian ad litem” or “family court guardian ad litem” education.
 - (2) The appointing court has made a finding in writing or on the record that the action or proceeding presents exceptional or unusual circumstances for which the lawyer is otherwise qualified by experience or expertise to represent the best interests of the minor.

An attorney who has not completed the requisite training may otherwise be appointed as a guardian ad litem in a [Wis. Stat.](#) ch. 767 action only if the court finds exceptional or unusual circumstances for which the lawyer is otherwise qualified by experience or expertise as noted in [SCR 35.015\(2\)](#) above.

In addition, the statutes require that training for a guardian ad litem acting in family court include “training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.” See [Wis. Stat.](#) § 757.48(1)

(a). Comprehensive training on how to assess and identify domestic violence issues is beyond the scope of this book. There is, however, a *Domestic Abuse Guidebook for Wisconsin Guardians ad Litem: Addressing Custody, Placement, and Safety Issues* (2017), <https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf>, created by the Governor’s Council on Domestic Abuse and End Domestic Abuse Wisconsin, which sets forth a four-part framework for identifying, understanding, and accounting for abuse in recommendations. That guidebook is referred to and summarized in section [3.39](#), *infra*. [SCR 35.03\(1m\)](#) provides that family court guardian ad litem education should be on any of the following:

1. Proceedings under [Wis. Stat.](#) ch. 767;
2. Child development;
3. The effects of conflict and divorce on children;
4. Mental-health issues in divorcing families;
5. Dynamics and impact of family violence; or
6. Sensitivity to various religious backgrounds, racial and ethnic heritages, and issues of cultural and socioeconomic diversity.

Practice Tip. Considering the complexity of domestic violence issues, combined with ongoing developments in domestic violence research and the substantial effects that domestic violence issues have on children, an attorney who desires to serve effectively as a guardian ad litem may want to obtain training regarding domestic violence issues in excess of the mandated minimums.

B. Time of Appointment [§ 3.16]

[Wis. Stat.](#) § 767.407(2) specifies that appointment of the guardian ad litem must be made in actions under [Wis. Stat.](#) ch. 767 “whenever the court deems it appropriate.” However, the statute also provides that if legal custody or physical placement is contested, the guardian ad litem must be appointed “at the time specified in [[Wis. Stat.](#) §] 767.405(12)(b), unless upon motion by a party or its own motion, the court determines that earlier appointment is necessary.” [Wis. Stat.](#) § 767.407(2). [Wis. Stat.](#) § 767.405(12)(b) provides as follows:

If after mediation under this section the parties do not reach agreement on legal custody or periods of physical placement, the parties or the mediator shall so notify the court. Except as provided in [[Wis. Stat.](#) §] 767.407(1)(am), the court shall promptly appoint a guardian ad litem under [[Wis. Stat.](#) §] 767.407. Regardless of whether the court appoints a guardian ad litem, the court shall, if appropriate, refer the matter for a legal custody or physical placement study under sub. (14). If the parties come to agreement on legal custody or physical placement after the matter has been referred for a study, the study shall be terminated. The parties may return to mediation at any time before any trial of or final hearing on legal custody or periods of physical placement. If the parties return to mediation, the county shall collect any applicable fee under [[Wis. Stat.](#) §] 814.615.

Thus, in cases in which legal custody or physical placement is contested, the guardian ad litem is appointed only after completion of the mediation process, unless the court determines that an earlier appointment is necessary. Since 1988, Wisconsin has had comprehensive provisions for mediation in actions affecting the family. See [Wis. Stat.](#) § 767.405. The guardian ad litem must be familiar with the mediation procedures and terminology. In cases involving relocation under [Wis. Stat.](#) § 767.481, the guardian ad litem will be appointed at the same time mediation is ordered; however, the guardian ad litem need not commence an investigation until after receiving notification that mediation failed. [Wis. Stat.](#) § 767.481(2)(c)3.

Failure to appoint a guardian ad litem in a timely manner is appealable error. In *Johnson v. Johnson*, [157 Wis. 2d 490](#), [460 N.W.2d 166](#) (Ct. App. 1990), the court held that it was error to fail to timely appoint a guardian ad litem to represent the interests of a child at a hearing on a motion to reopen a judgment of divorce to question paternity. The court also held that it was not sufficient merely to appoint a guardian ad litem once the proceedings had been under way for a significant period.

Despite the clarity of the statute regarding the appropriate time for the appointment, practice varies widely by county and by court. It is not uncommon for a guardian ad litem appointment to be made shortly after filing if a case appears complex or as late as a status conference shortly before trial.

C. Termination and Extension of Appointment [§ 3.17]

[Wis. Stat.](#) § 767.407(5) clarifies that the appointment of the guardian ad litem terminates either upon the entry of the court's final order or upon the termination of any appeal in which the guardian ad litem participates. This will serve to eliminate most postjudgment confusion about what duties, if any, the guardian ad litem has after the court has entered an order. [Wis. Stat.](#) § 767.407(5) also provides that, at any time, the guardian ad litem, any party, or the person for whom the appointment is made may ask that the court extend or terminate the guardian ad litem's appointment or reappointment. Further, this statute specifies the procedure the guardian ad litem must follow in an appeal. *See infra* § [3.25](#).

In *Paige K.B. v. Molepske*, [219 Wis. 2d 418](#), [580 N.W.2d 289](#) (1998), the supreme court noted:

[T]he appointing court oversees the conduct of the [guardian ad litem], and may on its own, or at the request of a parent, remove and replace the [guardian ad litem]. In overseeing the conduct of a [guardian ad litem], the circuit court plays a vital role [and] must not idly wait for or blindly rely on a [guardian ad litem]'s recommendation.... If the circuit court, for any reason, finds a [guardian ad litem]'s performance inadequate to protect the best interests of the child, the court should either remove and replace that [guardian ad litem] or take other appropriate action.

Id. at 434–35 (citation omitted).

Practice Tip. To avoid any confusion as to when the guardian ad litem appointment terminates, the guardian ad litem can request that the parties, attorneys, or court include a discharge and payment order in the final marital settlement agreement, stipulation, or order.

D. Status Hearing to Review Actions of Guardian ad Litem [§ 3.18]

Either party may request a status conference no sooner than 120 days after the appointment of a guardian ad litem, or 120 days after the last status conference under [Wis. Stat.](#) § 767.407(4m), to review “the actions taken and work performed by the guardian ad litem in the matter.” [Wis. Stat.](#) § 767.407(4m). This provision was intended as a mechanism for encouraging judicial monitoring of a guardian ad litem's performance during the pendency of the case. Substantive concerns by a parent about the job performance of the guardian ad litem can and should be addressed under this section rather than by the parent bringing a request or motion to terminate the appointment of the guardian ad litem. A status hearing can also be an opportunity for the guardian ad litem to address a party's lack of cooperation in the investigation or in the nonpayment of fees.

Practice Tip. A guardian ad litem should not hesitate to take a strong position at a status or review hearing. As long as a guardian ad litem can provide a factual basis for a recommendation, the court will likely appreciate a strong position. If a guardian ad litem is looking for additional time or additional information before making a recommendation, the guardian ad litem should be prepared to indicate to the court the specifics of what is needed to complete the investigation.

V. Legal Custody and Physical Placement Actions [§ 3.19]

A. Procedure upon Being Appointed [§ 3.20]

After being asked to serve as guardian ad litem, the attorney should first run a conflict check to ensure that the attorney does not have a conflict of interest.

After confirming there is not a conflict, the attorney should determine whether any time constraints will prevent the attorney from doing the job well—that is, whether the attorney's schedule will permit taking immediate action, if necessary. For example, there may be an issue regarding possession of the home or the need for supervised placement (for example, because of mental illness or substance abuse) that requires an immediate investigation. The attorney should not accept an appointment if the attorney cannot meet the immediate demands of the case or if the attorney is concerned about the attorney's lack of expertise in certain areas, such as domestic abuse issues.

Next, the attorney should sign the consent to act, which usually happens at the same time as the order appointing the guardian ad litem. The standard court form for an order appointing a guardian ad litem or attorney is Form [GF-131A](#), and the form for a consent to

act is Form [GF-131B](#). Copies of the forms are available through the Wisconsin Court System's website at <https://www.wicourts.gov/forms1/circuit/index.htm>.

After signing the consent to act, the guardian ad litem should review the existing court file. This will assist the guardian ad litem in determining a timetable. The file provides the guardian ad litem with information regarding existing orders, previous and ongoing disputes, police involvement, and former guardians ad litem.

The guardian ad litem should contact the opposing attorneys and the family court counselor, if any, to advise them of the guardian ad litem's appointment. The guardian ad litem may also wish to obtain background information from the attorneys and the counselor to determine whether immediate action is necessary. The guardian ad litem should request that the attorneys have their clients contact the guardian ad litem for an appointment and complete any requested paperwork such as a proposed parenting plan or guardian ad litem questionnaire. Continuing permission to contact each party directly when necessary should also be requested. This permission, if granted, should be verified in writing to avoid any future problems or concerns about violation of the ethical consideration set forth in [SCR 20:4.2](#).

Practice Tip. It is generally sufficient to present the party's attorney with a written passive waiver in which the guardian ad litem states that consent to contact the party will be assumed unless the guardian ad litem is advised to the contrary.

Typically, the next step is to interview each party (usually, but not necessarily, the parents). Initially, each party should be interviewed separately. During the initial interview, the guardian ad litem should explain the GAL's role. The guardian ad litem should notify the parents that there is no attorney-client privilege with the guardian ad litem. The guardian ad litem should stress that the paramount concern is the children's best interests. The guardian ad litem should also ascertain each party's goals and each party's view of the background of the dispute. In other words, the guardian ad litem should determine the role each party served with respect to the children in the past (e.g., whether there was a primary child-care provider, and whether both parties were interested or active parents) and what each party now wants with respect to the children's future (e.g., legal custody, physical placement, restrictions on physical placement). These interviews frequently result in the guardian ad litem's obtaining drastically different information from each party. Therefore, the guardian ad litem should keep an open mind about the various pieces of information and should seek corroboration from other sources. The initial contacts with the parents should include a specific domestic-violence screening tool because cases without an express screening protocol tend to underdetect intimate-partner violence. The *Domestic Abuse Guidebook* discussed in [appendix 3A](#), *infra*, contains sample screening tools. For further information useful to the guardian ad litem's assessment of the parents, see [chapter 2](#), *supra*.

Practice Tip. Parents might be nervous about the investigation process. It is good practice to schedule the parties' initial meetings as close together in time as possible. Intentionally scheduling one parent in the morning and one in the afternoon of the same day, or seeing the two parents on back-to-back days, demonstrates to the parents at the beginning of the process that the guardian ad litem intends the investigation to be even-handed and impartial. Substantively, hearing both principal versions of the story in immediate succession facilitates a balanced evaluation.

The guardian ad litem should next determine whether it is appropriate to interview the children and, if so, when such an interview should take place. Very young children might not yet be capable of participating in an interview. For children old enough to be interviewed, the guardian ad litem must consider whether to interview each child separately or the children together, and whether to conduct an interview in the office setting, at school, or at another location. The nature of the case may also affect the analysis of whether to interview a child. Some disputes, such as those regarding the safety of a parent's home, or contacts with a parent's new partner, might not require information from the child. In most cases, however, the child should be interviewed. For information on effective approaches in interviewing children, see [chapter 2](#), *supra*.

The guardian ad litem should also arrange to meet with the family court counselor or social worker in the case, if any, as soon as possible to share appropriate information and consider coordinating the information-gathering process. For example, it might not be necessary for the family court counselor or social worker and the guardian ad litem each to obtain medical information authorizations and medical records if these can be shared; however, it is crucial that the parents sign off on the medical information being shared between the family court counselor or social worker and the guardian ad litem once it is received.

Note. The sharing of medical records presents concerns under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, which are discussed briefly in [chapter 4](#), *infra*. A guardian ad litem should not

disseminate medical records without reviewing whether the GAL has the authority to do so.

Similarly, school records and other written documentation can possibly be shared.

Practice Tip. The one exception to the suggestion that a newly appointed guardian ad litem meet with the court counselor or social worker as soon as possible occurs in the situation in which the counselor or social worker has completed that individual's recommendation, one party is challenging it, and the guardian ad litem appointment is then made in anticipation of trial. In that situation, a guardian ad litem's assessment and recommendation will carry more weight if it is clearly independent of the first evaluation. In those cases, it may be more effective for the guardian ad litem to meet first with the parents, review the raw data used in the initial recommendation, and collect any new data not reviewed by the counselor or social worker, before discussing the case with them. This process allows the parents to be more confident that an independent investigation has occurred and facilitates settling the case short of trial.

Depending on the nature of the issue in question, the guardian ad litem should then contact, after obtaining the appropriate releases, any mental-health professionals, health-care personnel, teachers, and other persons who may be currently involved with the family or who may have useful information. Specialized information should be obtained from the various professionals involved. It is important to keep in mind that the guardian ad litem is not a social worker, a psychiatrist, or a physician but is an attorney acting as an advocate for the child's best interests. *See supra* [ch. 2](#) (importance of contacting mental-health professionals, health-care personnel, teachers, social workers, and others).

Guardians ad litem follow these procedures as part of the preparation for a hearing or trial and must prepare for such hearings as they would when representing any other client. That is, guardians ad litem must be prepared to present information, testimony, and evidence to promote and support their beliefs as to what is in the best interests of the children. Obviously, guardians ad litem must also be prepared to object to other evidence or testimony and to cross-examine other witnesses.

It is important to keep in mind that the goal of the guardian ad litem, as an independent advocate for the minor child's best interests, is to make a recommendation before trial. This recommendation need not be agreeable to one party or the other. There may be agreement with one party's position on custody and disagreement with that party's position on physical placement. The guardian ad litem should formulate and orally present the GAL's recommendation to the parties before the final hearing. This may assist the parties in reaching a settlement before going to trial. If no settlement is reached, the guardian ad litem must be prepared to participate in the trial and to present all testimony and evidence necessary to support that recommendation. At the end of the trial, the guardian ad litem is required to argue in favor of that recommendation. This process, however, does not preclude the guardian ad litem from changing the GAL's opinion and recommendation after hearing all the evidence.

B. Temporary Hearing Procedures [§ 3.21]

The appointment of the guardian ad litem typically takes place after the temporary order hearing. In some circumstances, however, the appointment may take place before the temporary order hearing, particularly when there are allegations of abuse, substance abuse issues, or other issues affecting the safety of the child. A temporary hearing may include several issues that would involve the appointment of a guardian ad litem, such as temporary custody, temporary physical placement, and temporary possession of the home.

A guardian ad litem should remember that at the temporary hearing stage a circuit court commissioner has the authority to order temporary sole legal custody *without* the parties' consent. *See Wis. Stat.* § 767.225(1)(a). This authority differs from the circuit court's authority in rendering a final judgment, and a temporary sole custody order may be a desired result at the temporary hearing stage when, typically, much information is yet to be gathered.

A temporary physical placement schedule is often a problematic issue at the temporary hearing stage. The temporary hearing may occur very shortly after a separation and when parties have not had any experience in working out physical placement arrangements between themselves. The hearing may also occur at a time when the level of distrust and anger between the parents is very high, and thus emotions may cloud the issues. Further, financial issues (e.g., child support, temporary maintenance, responsibility for debts) may often be an underlying factor or concern in one party's position or one party's ability to meet the needs of the children. The guardian ad litem must sort all this out as best as possible to make a recommendation.

Again, because of the timing of the temporary hearing and the underlying emotions, the issue of overnight placement is frequently in dispute. Whether there should be overnight placement with a nonprimary placement parent will often depend on the children's ages, each parent's experience in caring for the children, and other factors, such as allegations of drug or alcohol abuse. A guardian ad litem must be prepared to explain to the court why the guardian ad litem recommends less than 25% of the placement time for a parent so the court can make a proper finding. [Wis. Stat. § 767.225\(1\)\(am\)](#) ("If the court grants physical placement to one parent for less than 25 percent of the time, as determined under [\[Wis. Stat. §\] 49.22\(9\)](#), the court shall enter specific findings of fact as to the reasons that a greater allocation of physical placement with that parent is not in the best interests of the child.").

Another frequent concern at this stage is whether a parent's unrelated guests or roommates should be allowed to be present during physical placement. While restrictions on the presence of other adults might not be part of a final order, some restrictions might be appropriate until more information is obtained about relatives, friends, and associates of each parent. The breakup of a family (no matter how bad the marriage) can be extremely difficult for children to handle. In particular, the presence in the household of a person with whom the parent has a romantic relationship should usually be avoided until the children become better accustomed to their new living arrangements and until the other adults can be evaluated by the guardian ad litem and the custody investigator.

Problems regarding the time and manner of the physical exchange of the children also frequently occur at the temporary hearing stage. These problems become more serious when there has been a history of, or there is a likelihood of, physical abuse between the parents. In these cases, contact between the parents needs to be restricted. The guardian ad litem should explore various possibilities such as neutral sites for pickup and delivery or the involvement of a neutral third party. A request that temporary physical placement be supervised may be appropriate in some cases, especially if there are serious allegations of domestic violence, physical abuse of the children, or evidence of drug or alcohol abuse that may affect a nonprimary placement parent's ability to care for the children safely.

At times, there is an immediate issue regarding who should have temporary occupancy of the family home. According to *Sandy v. Sandy*, [106 Wis. 2d 230](#), [316 N.W.2d 164](#) (Ct. App. 1982), *aff'd*, [109 Wis. 2d 564](#), [326 N.W.2d 761](#) (1982), neither party may be ordered to vacate the residence of the parties unless there has been, or there is an imminent danger of, physical abuse or unless it is necessary for the best interests of the children that one person leave. Often, but not necessarily, the children will remain in the family home to minimize disruption in the children's lives. Because the temporary order often sets the tone for future proceedings, it may become hard to change its provisions. Thus, even though the order is temporary and subject to change, it is a very important stage in the proceedings.

If the guardian ad litem is appointed before the temporary hearing, it is advisable for the guardian ad litem to speak with the attorneys in the case to determine which witnesses, if any, will be called. The guardian ad litem should also find out whether the family court counselor or social worker, if one is already involved in the case, plans to attend the temporary hearing and make sure that the person is notified about the hearing and that the person's schedule permits attendance. The guardian ad litem must then decide whether any additional witnesses should be called to help the circuit court commissioner determine the issue at hand. After making that assessment, the guardian ad litem should determine whether enough time has been scheduled for the hearing to be completed at one time. If not, the guardian ad litem should request more time or another hearing date. In many Wisconsin counties, the first temporary hearing is not an evidentiary hearing. Because of the absence of testimony at a hearing in such counties, the guardian ad litem should be prepared to do as much investigating before the hearing as possible.

Regardless of whether the guardian ad litem is appointed before or after the temporary hearing, the guardian ad litem must ascertain any special immediate needs of the minor children. The guardian ad litem should consider several matters, for example, whether there are any health problems requiring medication, and if so, whether both parties have access to the necessary medication and whether both know how to administer it; whether both parents are aware of the minor children's medical or dental appointments and medical or dental providers so that health needs can be met; and whether the telephone numbers of the parents and of child-care providers have been exchanged.

Throughout the proceeding, it is important, when possible, to try to promote and improve the communication between the parties with respect to the minor children. It is also important to advise each parent to refrain from any activity that may be detrimental to the best interests of the children, such as degrading the other parent in the children's presence or engaging in indiscreet sexual behavior.

The guardian ad litem should be aware that a good short-term experience by the parties with respect to custody and physical placement can make the long-term solution much easier. If both parties realize that they can cooperate with respect to the minor children, they will more likely reach an agreement. Usually, a mutually agreeable settlement reached by the parties is better for the parties and the children and is more strictly followed than a court-imposed arrangement.

C. Discovery and Trial Preparation [§ 3.22]

In preparing for a trial, the guardian ad litem should use all appropriate discovery methods. These include, but are not limited to, demands for production of documents, such as health-care records, school records, and so forth (although, as a practical matter, this information will generally be provided without objection and without the use of formal discovery demands), and depositions. The guardian ad litem should attend any depositions that may involve issues related to the children and review all pleadings from the other attorneys that may pertain to the children.

The information-gathering process should always include interviews with both parents and almost always include meeting with the child. *See supra* § 3.20 (describing circumstances in which interviewing children might not be appropriate). Whether additional information is necessary depends on the nature of the issues presented. Information that is frequently useful, and should be obtained in most cases except those presenting the narrowest of issues, includes information obtained by making contact with the family court counselor or social worker, relatives, neighbors, teachers, school counselors, physicians, other counselors, psychologists, psychiatrists, child-care providers, and new spouses. Obviously, the information's weight depends to some extent on its source.

D. Trial [§ 3.23]

The guardian ad litem must be as prepared for trial as an attorney in any other case. The guardian ad litem should keep in mind, however, that in addition to routine trial preparation, the guardian ad litem must be prepared both to present the wishes of the child, *see* [Wis. Stat. § 767.41\(5\)\(am\)2.](#), and to ensure that the record contains, pursuant to [Wis. Stat. § 767.407\(4\)](#), evidence containing the guardian ad litem's investigation and report on whether either parent has engaged in interspousal battery or domestic abuse. Witnesses that the guardian ad litem intends to call (including the family court counselor) should be prepared for direct examination and cross-examination. Subpoenas should be issued if necessary. In addition, if pretrial or posttrial briefs are needed, the guardian ad litem should actively participate in writing them.

It is useful for the guardian ad litem and the other attorneys to coordinate trial procedure. Specifically, to avoid unnecessary duplication, agreements may be reached as to which attorney will call which witnesses. It is important that the guardian ad litem keep in mind what must be proved to support the guardian ad litem's position regarding what is in the children's best interests. The guardian ad litem should also consider the tactical advantages to the order of calling witnesses.

At some point, the issue whether the judge will see and hear from the children must be resolved. How the judge will do so—whether by hearing testimony or by conducting an interview—must also be determined. These decisions are largely left to the circuit court's discretion. Although Wisconsin's child custody and physical placement statute “requires the court to consider the child's preference,” *Hughes v. Hughes*, [223 Wis. 2d 111](#), 131, [588 N.W.2d 346](#) (Ct. App. 1993) (holding that it was not error for court to disallow child's testimony when guardian ad litem and several witnesses had communicated child's wishes to court). The guardian ad litem, however, should be prepared to recommend to the judge whether testimony or an interview would be in the children's best interests. If an interview in chambers is to be conducted, the guardian ad litem should make a recommendation concerning how it will be conducted and who will be present.

The guardian ad litem should remember that a guardian ad litem functions as an attorney and cannot disregard the record and the rules of evidence in presenting the GAL's recommendation to the court. This principle was illustrated by *Kettner v. Kettner*, [2002 WI App 173](#), [256 Wis. 2d 329](#), [649 N.W.2d 317](#), in which the appellant (the father in the case) claimed that the circuit court inappropriately delegated the decision-making to the guardian ad litem. The court of appeals stated that the appellant had waived his right to address these issues by failing to object at the time of trial. *Id.* ¶ 20. In a footnote, however, the court stated:

We do agree with [the father] that the trial court's questioning of the guardian ad litem was inappropriate. The dialogue between the trial court and the guardian ad litem appears to ask the guardian ad litem for his opinion of the facts and solicited from him additional information not in the record.

Id. n.8.

The court also noted:

While the guardian ad litem is free to comment on the submitted evidence and make legal arguments, the guardian ad litem is not the final arbiter of the truth. Nevertheless, we are satisfied from our reading of the record that the trial court reached its own independent decision that, based upon the evidence presented, there was insufficient evidence to find a substantial change of circumstances.

Id.

Practice Tip. Neither *Kettner* nor any other case law or statute provides an evidentiary basis to admit, outside the standard rules of evidence, the results of the guardian ad litem’s obligatory investigation, per [Wis. Stat. § 767.407](#), into whether either parent has committed interspousal battery or domestic abuse. The trial preparation process should, therefore, ensure that whatever evidence is found can go into the record and be available to the court during the hearing.

E. Postjudgment [§ 3.24]

1. Appeal [§ 3.25]

Because of the discretionary nature of decisions involving custody and physical placement, appeals from these decisions are not common. It is clear, however, that the guardian ad litem’s obligations include representation on appeal. *Marotz v. Marotz*, [80 Wis. 2d 477](#), [259 N.W.2d 524](#) (1977). [Wis. Stat. § 767.407\(5\)](#) provides that a “guardian ad litem may appeal, may participate in an appeal or may do neither.” If a guardian ad litem chooses not to participate in the appeal, the guardian ad litem “shall file with the appellate court a statement of reasons for not participating.” [Wis. Stat. § 767.407\(5\)](#).

[Wis. Stat. § 809.19\(6m\)](#) controls the timing of the filing of the guardian ad litem’s brief on appeal. If the guardian ad litem chooses to participate and takes the appellant’s position, the guardian ad litem must file a brief within 40 days after the filing of the record on appeal. If the guardian ad litem chooses to participate and takes the respondent’s position, the guardian ad litem has 30 days after service of the appellant’s brief to file a brief. If the guardian ad litem chooses not to participate in an appeal of an action or proceeding, the guardian ad litem must file with the court a statement of reasons for not participating within 20 days after the filing of the appellant’s brief.

Note. [Wis. Stat. § 767.407\(5\)](#) provides that “[i]rrespective of the guardian ad litem’s decision not to participate in an appeal, the appellate court may order the guardian ad litem to participate in the appeal.”

2. Change of Legal Custody and Physical Placement [§ 3.26]

The modification of legal custody and physical placement orders is controlled by [Wis. Stat. § 767.451](#). The general rule is that substantial modifications to orders concerning legal custody and physical placement are prohibited within two years after the final judgment determining legal custody or physical placement unless “the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.” [Wis. Stat. § 767.451\(1\)\(a\)](#). Once two years have elapsed since the judgment, the court may modify legal custody and physical placement orders if (1) the modification is in the best interest of the child, and (2) there has been a substantial change of circumstances since the entry of the last order. [Wis. Stat. § 767.451\(1\)\(b\)](#). Although the term “substantial change of circumstances,” with regard to legal custody and physical placement, is not defined in the statutes,

[t]he term “substantial change of circumstances” is well known in family law. It focuses on the facts. It compares the facts then and now. It requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court’s considering whether to modify the order.

Licary v. Licary, [168 Wis. 2d 686](#), 692, [484 N.W.2d 371](#), 374 (Ct. App. 1992).

In limited circumstances, courts can approve stipulations to modify legal custody or placement based on a contingent future event—specifically, one reasonably certain to occur within two years. The relevant statute, [Wis. Stat. § 767.451\(3r\)](#), states as follows:

(3r) APPROVAL OF STIPULATION FOR MODIFICATIONS CONTINGENT ON FUTURE EVENT. Notwithstanding [\[Wis. Stat. § 767.451\]\(1\)](#), in an action to modify a legal custody or physical placement order, the court may approve a stipulation for further modifications to legal custody or physical

placement upon the occurrence of a specified future event, as defined in [Wis. Stat. § 767.34\(3\)\(a\)](#), that is reasonably certain to occur within 2 years of the date of the stipulation and incorporate the terms of the stipulation into any revised legal custody or physical placement order granted by the court. The court may not approve a stipulation under this subsection that is based on an anticipated behavior modification of a party.

[Wis. Stat. § 767.407\(1\)\(a\)](#) directs the court to appoint a guardian ad litem in any action affecting the family when the court has reason to be concerned about the welfare of the child and when the legal custody or physical placement of the child is contested, unless certain facts are found. Under [Wis. Stat. § 767.407\(1\)\(am\)](#), the court need not appoint a guardian ad litem in a contested action for a change of custody or placement in which the modification sought would not substantially alter the amount of time each parent has with the child and in which the court finds either of the following: (1) the appointment of a guardian ad litem would not be helpful to the court, because the facts and circumstances make the likely custody or placement determination clear; or (2) a party seeks to have a guardian ad litem appointed for tactical purposes or to delay the proceedings, rather than for a purpose that is in the child's best interest. If the court appoints a guardian ad litem in an action for a modification of custody or placement, it is likely to appoint the same guardian ad litem who was involved in the original custody or placement order.

3. Relocating with a Minor Child [§ 3.27]

Since 1984, the law governing moving with a child has been subject to considerable revision. Presently, [Wis. Stat. § 767.481](#) governs the relocation of a minor child who is the subject of a legal custody or physical placement order. *See* 2017 Wis. Act 203 (eff. Apr. 5, 2018); *see also* Christopher S. Krimmer, *Dissecting the New Family Relocation Statute*, Wis. Law., July/Aug. 2018, at 28. The current law expressly requires the court to appoint a guardian ad litem immediately in a contested relocation case. Under [Wis. Stat. § 767.481\(2\)\(c\)3.](#), the guardian ad litem need not commence investigation unless the mediator notifies the court that the parties were unable to reach an agreement. The initial hearing must be scheduled within 30 days after the filing of the action, [Wis. Stat. § 767.481\(2\)\(a\)](#), and a further hearing must be scheduled within 60 days after the initial hearing, [Wis. Stat. § 767.481\(2\)\(c\)4.](#), putting the guardian ad litem under substantial time pressure. This pressure is even greater if the parent proposing the move requests a temporary order permitting the move. The procedures, contacts, and preparation tactics for a hearing on the issue of relocation include those mentioned in section [3.20](#), *supra*.

[Wis. Stat. § 767.481\(4\)](#) sets forth the applicable standards for deciding relocation motions. As with modifications of legal custody and physical placement orders under [Wis. Stat. § 767.451](#), the standard under [Wis. Stat. § 767.481](#) is a best-interests standard. However, in making its determination regarding whether relocation of the child will be permitted or prohibited, the court must consider the following factors:

1. The factors under [Wis. Stat. § 767.41\(5\)](#);
2. A presumption that the court should approve the plan of the parent proposing the relocation if the court determines that the objecting parent has not significantly exercised court-ordered physical placement; and
3. A presumption that the court should approve the relocation plan if the court determines that the parent's relocation is related to abuse.

[Wis. Stat. § 767.481\(4\)\(b\)](#).

For a discussion of the relevant factors to consider in determining the child's best interests in a removal case, *see Kerkvliet v. Kerkvliet*, [166 Wis. 2d 930](#), [480 N.W.2d 823](#) (Ct. App. 1992).

VI. Paternity Actions [§ 3.28]

A. Overview [§ 3.29]

The court must appoint a guardian ad litem for the child in a paternity action if [Wis. Stat. § 767.407\(1\)\(a\)](#) or (c) applies or if the court is concerned that the child's best interest is not being represented. [Wis. Stat. § 767.82\(1\)\(b\)](#).

[Wis. Stat.](#) § 767.407 no longer states that a guardian ad litem must be appointed in any action in which paternity is contested under [Wis. Stat.](#) § 891.39. *Cf.* [Wis. Stat.](#) § 767.045 (1987–88), *repealed and recreated by* Wis. Sup. Ct. Order, 151 Wis. 2d xxv, xxxi (eff. Jan. 1, 1990). However, [Wis. Stat.](#) § 891.39(1)(a), which requires appointment of the guardian ad litem in instances in which a marital child’s paternity is questioned, remains unchanged. [Wis. Stat.](#) § 891.39(1)(a) provides:

Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence. In all such actions or proceedings the husband and the wife are competent to testify as witnesses to the facts. The court or judge in such cases shall appoint a guardian ad litem to appear for and represent the child whose paternity is questioned.

Further, under [Wis. Stat.](#) § 767.82(1)(a), the court must appoint a guardian ad litem for a minor parent or for a minor who is alleged to be a parent in a paternity proceeding unless the minor parent or the minor alleged to be the parent is represented by an attorney.

The court of appeals specified reasons for appointing a guardian ad litem in paternity proceedings in *D.S.L. v. T.L.S. (In re Paternity of D.S.L.)*, [159 Wis. 2d 747](#), [465 N.W.2d 242](#) (Ct. App. 1990). The court noted that a child in a paternity proceeding may have interests that differ from those of the state or the mother:

The child ... can be interested in determining his or her right to support or inheritance, and the father’s right to seek custody.... [T]he child may have an interest in obtaining a complete medical history, amassing genealogical information, or establishing a meaningful bond with his or her father. The guardian ad litem is appointed by the court to protect these interests.

Id. at 752 (citation omitted).

The court of appeals, in *A.M.L. v. J.E.L. (In re Paternity of A.M.L.)*, [161 Wis. 2d 133](#), [467 N.W.2d 570](#) (Ct. App. 1991), also pointed out that a child may have an independent interest in identifying the child’s biological parent for several reasons, including the needs for medical information and financial support.

Because an action to determine paternity is, by definition, an action affecting the family, [Wis. Stat.](#) § 767.001(1)(L), the role, duties, and powers of the guardian ad litem in a paternity proceeding are similar in many respects to those of the guardian ad litem in the other actions affecting the family discussed above. *See supra* §§ [3.4–13](#), [3.20–27](#).

One decision that a guardian ad litem must make before a paternity action proceeds beyond preliminary stages is whether it is in the best interests of the minor child to proceed with the action. The court of appeals has rejected the proposition that “a determination of biological paternity is *always* in the best interest of a child.” *A.M.L.*, 161 Wis. 2d at 137 (quoting *L.H. v. D.H. (In re Paternity of D.L.H.)*, [142 Wis. 2d 606](#), 614, [419 N.W.2d 283](#), 286 (Ct. App. 1987)). If the guardian ad litem initiates a paternity action without acting in the child’s best interests, the guardian ad litem could be removed for violating the statutory duties. In *D.S.L.*, 159 Wis. 2d at 753, the court stated:

Were a trial court to rule that a guardian ad litem was not acting in the best interests of the child in initiating a paternity action, the proper procedure would be to dismiss the action without prejudice; to remove the guardian for violation of his statutorily mandated duty; and to reappoint another guardian.

It may be the case, if a child has an established relationship with a man who has acted as the child’s father, that the man’s paternity should not be subject to challenge. This type of case arises in two situations: (1) when a mother seeks, after several years of representing to other people that her husband is her child’s father, to rebut his presumed paternity; and (2) when a man who knew himself not to be the biological father of his wife’s child, but acted as father despite that knowledge, seeks to rebut his presumed paternity in a divorce.

Administrative paternity under [Wis. Stat.](#) § 767.804—establishing a conclusive determination of paternity through genetic testing—has the same effect as a judgment of paternity. [Wis. Stat.](#) § 891.407 (“Presumption of paternity based on genetic test results”). It does not, however, affect the existing marital presumption of paternity or the presumption when both parents sign a voluntary paternity acknowledgment (VPA).

Historical Note. Before the Wisconsin Legislature created [Wis. Stat.](#) §§ 767.804 and 891.407, *see* 2019 Wis. Act 95, the statutes indicated that a court *may require* and upon the request of a party *must* require the following people to submit to genetic testing in paternity actions: the child, the child’s mother, and any male for whom there was probable cause to believe that he had sexual relations with the mother during the possible time of the child’s conception. [Wis. Stat.](#) § 767.84(1)(a) (2017–18). But with the enactment of 2019 Wis. Act 95, “the court may ... require” was changed to “the court *shall* require” those parties to submit to genetic tests, subject to limited exceptions, regardless of whether a party has requested them. [Wis. Stat.](#) § 767.84(1)(a) (emphasis added).

B. Procedure upon Being Appointed in a Paternity Action [§ 3.30]

After a guardian ad litem has accepted an appointment and signed a consent to act in a paternity action, the first issue for the guardian ad litem to determine is whether paternity has been established. If paternity has not been established, the court under [Wis. Stat.](#) § 767.84(1)(a) *must* order genetic testing, as noted in section [3.29](#), *supra*.

Upon a motion of a party or guardian ad litem, if the court finds that a judicial determination of paternity with respect to a specific male is not in the best interest of the child, the court may dismiss the action with respect to that male regardless of whether genetic tests have been performed or what the results of the tests were. [Wis. Stat.](#) § 767.855.

[Wis. Stat.](#) § 767.82 sets forth certain procedures that are specific to paternity proceedings. That statute further states, however, that except as specifically provided otherwise, “paternity proceedings shall be governed by the procedures applicable to other actions affecting the family.” [Wis. Stat.](#) § 767.82(8); *see also* 3 Wisconsin Supreme Court Office of Judicial Education, [Wisconsin Judicial Benchbook: Family](#) ch. FA 16 (State Bar of Wis. 8th ed. 2024) (paternity procedures).

VII. Practical Concerns and Considerations for a Guardian ad Litem in Family Court [§ 3.31]

A. Costs [§ 3.32]

As in any civil litigation, the costs in cases involving the best interests of children can be large. For example, it may be necessary to hire expert witnesses to prepare psychological reports after evaluating the parties. In addition, it may be necessary to have expert witnesses testify at trial or during the discovery process. Thus, to avoid problems, the guardian ad litem should obtain approval and agreement before incurring any significant out-of-pocket expenses. [Wis. Stat.](#) § 767.407(6) provides, in part:

[U]pon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter.

To spare the parties any unnecessary expenses, the guardian ad litem should also attempt to avoid any unnecessary duplication of effort and cost by coordinating efforts with those of the other attorneys and with those of the family court counselor or social worker assigned to the case.

B. Payment [§ 3.33]

[Wis. Stat.](#) § 767.407(6) provides:

The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order either or both parties to pay all or any part of the compensation of the guardian ad litem. ... If both parties are indigent, the court may direct that the county of venue pay the compensation and fees. If the court orders a county to pay the compensation of the guardian ad litem, the amount ordered may not exceed the compensation paid to private attorneys under [\[Wis. Stat. §\] 977.08\(4m\)\(b\)](#). The court may order a separate judgment for the amount of the reimbursement in favor of the county and against the party or parties responsible for the reimbursement. The court may enforce its orders under this subsection by means of its contempt power.

Under [Wis. Stat.](#) § 977.08(4m)(e) (applicable to cases assigned on or after July 1, 2023), the amount to be paid to private attorneys is \$100 per hour for time spent related to a case, excluding time spent on travel, and \$50 per hour on travel related to a case if any portion of the trip is outside the county in which the attorney’s principal office is located or if the trip requires traveling a distance of

more than 30 miles, one way, from the attorney's principal office. Cf. [Wis. Stat. § 977.08\(4m\)\(b\)](#) (stating amounts applicable in cases assigned between December 1, 1992, and July 29, 1995).

The court of appeals has made clear that an indigent party cannot be ordered to pay guardian ad litem fees and that [Wis. Stat. § 767.407\(6\)](#) does not permit a court to order the county to pay guardian ad litem fees when only one party to a [Wis. Stat. ch. 767](#) proceeding is found to be indigent. *Olmsted v. Circuit Ct. for Dane Cnty.*, [2000 WI App 261](#), [240 Wis. 2d 197](#), [622 N.W.2d 29](#).

Immediately after accepting the appointment, the guardian ad litem should inform the parties of the requirements for payment, the hourly rate, and the billing procedures. Accurate and itemized time records should be kept so that a monthly bill can be presented and supported. The hourly rate must be determined and approved by the judge. [Wis. Stat. § 757.48\(1\)\(b\)](#) provides that “[t]he guardian ad litem shall be allowed reasonable compensation for his or her services such as is customarily charged by attorneys in this state for comparable services.” In private-pay cases, therefore, most guardians ad litem receive their standard hourly rate or a slightly reduced rate.

C. Miscellaneous Concerns [§ 3.34]

One of the most difficult aspects of serving as a guardian ad litem is dealing with the elusive best-interests standard. This standard is impossible to define with any degree of specificity. Moreover, it is also difficult, at times, to distinguish between the best interests of the child and the best interests of the parents. Although the task is difficult and although it may be presumptuous to tell other people what is best for their children, the duty to represent a child's best interests cannot be avoided and requires conscientious attention.

Further, confidentiality is often a problem in the information-gathering process. It is important for people to express their honest beliefs with regard to the questions raised, but it is also important that all people with whom the guardian ad litem consults understand that the information they give may be used in the decision-making process and they may be called to testify to the evidence they have provided in the investigation process.

In sum, the guardian ad litem's role as an advocate for the best interests of minor children is an extremely important one. The duties must be performed conscientiously and vigorously, and an appointment as guardian ad litem should not be accepted unless the attorney can devote the time and attention necessary to fulfill the role.

VIII. Forms [§ 3.35]

A. In General [§ 3.36]

Parties and court officials in all civil actions and proceedings in circuit court must use any applicable standard court forms adopted by the Wisconsin Judicial Conference. See, e.g., [Wis. Stat. § 807.001](#). Standard forms adopted by the Judicial Conference are available from all clerk of court's offices and are also listed on and downloadable from the Wisconsin Court System's website: <https://www.wicourts.gov/forms1/circuit.htm>. If the Judicial Conference does not create a standard court form for a particular action or pleading, a format consistent with any statutory or court requirements may be used. [Wis. Stat. § 807.001\(4\)](#).

For further information about standard court forms, contact the Records Management Committee (RMC), which advises the Director of State Courts Office and is responsible for developing the standard court forms.

An attorney should *always* check original sources of authority for current law and adapt the sample language of any nonmandatory forms to fit the client's circumstances.

B. Order and Judgment for Payment of Guardian ad Litem Fees (ELD-0038) [§ 3.37]

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY
 _____ BRANCH

In re Marriage of

(Petitioner's name)

Petitioner

and

Case No. _____

(Respondent's name)

Respondent

**ORDER AND JUDGMENT FOR PAYMENT
OF GUARDIAN AD LITEM FEES**

This court having reviewed the billing statement of the guardian ad litem for fees incurred in connection with the above-captioned divorce action and having reviewed the financial declarations of each of the respective parties and their ability to contribute to the fees of the guardian ad litem,

THE COURT FINDS that fees in the amount of \$(dollar amount) are reasonable and that the parties should share in payment of the fees.

IT IS ORDERED that the fees in the amount of \$(dollar amount) be awarded to (guardian ad litem's name), an attorney admitted to practice in Wisconsin, in payment for (guardian ad litem's name's) services as guardian ad litem for the minor child(ren) of the parties and that:

The petitioner shall pay the sum of \$(dollar amount) as follows:

The respondent shall pay the sum of \$(dollar amount) as follows:

IT IS FURTHER ORDERED that the parties notify the (county's name, e.g. Green) County Clerk of Court within 10 days after any change of address or employment until such time as the reimbursement is made in full.

IT IS FURTHER ORDERED that this order be enforced in the same manner as orders for payment of maintenance and child support. At the option of the guardian ad litem at any time after the date a party ordered to make reimbursement fails to make a timely payment, the guardian ad litem may have and recover judgment against that party for the remaining unpaid amount upon motion supported by evidence of nonpayment with notice of the motion to the delinquent party and the delinquent party's attorney of record.

IX. Appendix [§ 3.38]

A. Appendix 3A: Domestic Abuse Cases: Four-Part Framework [§ 3.39]

Note. This appendix was compiled for the fifth edition of the *Guardian ad Litem Handbook* by Attorney Tess Meuer, former Director of Justice Systems, and Attorney Tony Gibart, former Associate Director, of End Domestic Abuse Wisconsin, in Madison. The appendix highlights pertinent discussions from the *Domestic Abuse Guidebook for Wisconsin Guardians ad Litem: Addressing Custody, Placement, and Safety Issues* (2017), <https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf> [hereinafter *Domestic Abuse Guidebook*], written by the Governor’s Council on Domestic Abuse and End Domestic Abuse Wisconsin and based on the four-part framework created by the Battered Women’s Justice Project—National Child Custody Project. The websites cited in this discussion have been updated as part of the sixth edition of *The Guardian ad Litem Handbook*, but the appendix otherwise reflects the content previously compiled for the fifth edition.

I. What Is the Role of a Guardian ad Litem in Family Law Cases Involving Family Violence?

A. If appointed, the guardian ad litem “*shall consider*, but not be bound by,” the following:

1. The wishes of the minor child;
2. The positions of others as to the best interest of the minor child; and
3. Custody studies under the mediation provisions in [Wis. Stat. § 767.405\(12\)](#).

[Wis. Stat. § 767.407\(4\)](#) (emphasis added).

B. The guardian ad litem “*shall consider*” the best-interest-of-the-child factors under [Wis. Stat. § 767.41\(5\)\(am\)](#). *Id.* When the court finds a parent has engaged in a pattern or serious incident of interspousal battery, as described under [Wis. Stat. § 940.19](#) or [940.20\(1m\)](#), or domestic abuse, as defined in [Wis. Stat. § 813.12\(1\)\(am\)](#), the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse “*shall be* the paramount concerns in determining legal custody and periods of physical placement.” [Wis. Stat. § 767.41\(5\)\(bm\)](#) (emphasis added); *see also* [Wis. Stat. § 767.407\(4\)](#).

C. If appointed, and unless the child otherwise requests, the guardian ad litem “*shall communicate*” to the court the wishes of the child as to the child’s legal custody and physical placement so that the court may consider the wishes of the child as a factor in determining custody and placement under [Wis. Stat. § 767.41\(5\)\(am\)2](#). [Wis. Stat. § 767.407\(4\)](#) (emphasis added).

D. The guardian ad litem “*shall review and comment* to the court on any mediation agreement and stipulation made” under [Wis. Stat. § 767.405\(12\)](#), and the guardian ad litem shall review and comment to the court on any parenting plan filed under [Wis. Stat. § 767.41\(1m\)](#). *Id.* (emphasis added).

E. The guardian ad litem also “*shall investigate*” whether there is evidence that either parent has engaged in interspousal battery or domestic abuse, and “*shall report*” to the court on the results of the investigation. *Id.*

II. *Domestic Abuse Guidebook for Wisconsin Guardians ad Litem: Addressing Custody, Placement, and Safety Issues*

An important resource for guardians ad litem in these cases is the *Domestic Abuse Guidebook*, which includes an overview of a four-part framework developed by the Battered Women’s Justice Project (BWJP), in consultation with National Council of Juvenile and Family Court Judges (NCJFCJ) and representatives from the Association of Family and Conciliation Courts, with support from the U.S. Department of Justice Office of Violence Against Women. The material and practice guides were informed by researchers, scholars, expert practitioners, and battered and battering parents across the country. The BWJP framework has been published as Gabrielle Davis et al., *Practice Guides for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters* (2018), <https://bwjp.org/assets/compiled-practice-guides-may-2018.pdf> [hereinafter *BWJP Guides*].

The framework is the result of a national study that conducted a safety audit at the request of judicial officers in Henry County, Ohio. The national five-year project reviewed all literature on child custody, domestic abuse, and parenting; conducted extensive focus groups and interviews; and reviewed all evaluator reports including those done by guardians ad litem. The project concluded that a disconnect exists between what is learned about abuse and recommendations made to the court.

The project’s five years of comprehensive research found the following:

1. Domestic violence is often not detected in disputed child custody cases. Janet Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 Fam. Ct. Rev. 283, 283–94 (2005); *see also* Robin H. Ballard et al., *Detecting Intimate*

- Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 Psychology, Pub. Policy & L. 241 (2011); Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 Violence Against Women 1022, 1022–53 (2015).
2. Screening for physical violence alone is insufficient to detect coercive controlling abuse. Connie J.A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 Fam. Ct. Rev. 555 (2010).
 3. Practitioners who do not use systematic screening methods tend to underdetect intimate partner violence between custody-disputing parents. Robin H. Ballard et al., *Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 Psychology, Pub. Policy & L. 241 (2011); Amy Holtzworth-Munroe et al., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 Fam. Ct. Rev. 646 (2010).
 4. Even when intimate partner violence is detected, cases often proceed without accommodations for safety or power differentials. See Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 Violence Against Women 991 (2005); see also James N. Bow, *Review of Empirical Research on Child Custody Practice*, 3 J. of Child Custody 23 (2006).
 5. Evaluators' beliefs are more closely associated with their parenting recommendations than the actual nature, context, and severity of abuse they observe. Daniel G. Saunders, et al., U.S. Dep't of Just., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations* (2011), <https://www.ojp.gov/pdffiles1/nij/grants/238891.pdf>.
 6. Mothers' demeanor is more closely associated with evaluators' recommendations than with the severity level, type (conflict versus coercive control), or documentation of violence. Jason D. Hans et al., *The Effects of Domestic Violence Allegations on Custody Evaluators' Recommendations*, 28 J. Fam. Psychology 957 (2014).
 7. Evaluators' knowledge about domestic violence (awareness of risk factors and application of a power and control model) is more predictive of their parenting recommendations than (1) the severity of abuse, or (2) the thoroughness of their investigations. Michael S. Davis, et al., U.S. Dep't of Just., *Custody Evaluations When There Are Allegations of Domestic Violence* (2010), <https://www.ojp.gov/pdffiles1/nij/grants/234465.pdf>.

The national workgroup concluded that evaluators will all benefit from a uniform approach to these cases. As a result, the workgroup created a four-part framework to allow systematic, consistent, and adequate reporting of domestic abuse by guardians ad litem in family law cases.

III. Overview of Four-Part Framework for Guardians ad Litem

- A. Identify Domestic Abuse: Is there an abuse issue here?
- B. Define the Nature and Context of Abuse: What is actually going on?
- C. Evaluate the Implications of Abuse by Considering Best Interests of Child: Why does it matter?
- D. Make Informed Recommendations That Account for Domestic Abuse: What can be done about it?

IV. Step One: Identify Domestic Abuse

The first step of the framework is to identify domestic abuse. The *Domestic Abuse Guidebook* contains these definitions of both domestic abuse and child abuse to apply the law to the facts:

1. *Domestic abuse*, as defined in the Family Code;
2. *Interspousal battery*, as defined in the Criminal Code;
3. *Abuse of a child*, as defined in Criminal Code and included in both civil and criminal laws;
4. *Primary physical aggressor*, as referred to in family law referring to former criminal law terminology;
5. *Predominant aggressor*, as updated in criminal law to refer to a primary physical aggressor; and
6. *Domestic abuse*, as defined in the Criminal Code.

One complication is that the term domestic abuse in the criminal context is slightly different than the definition of domestic abuse referred to throughout the Family Code. Because an abusive parent might be involved in the criminal justice system for domestic abuse, a guardian ad litem should also be familiar with the definition of domestic abuse in the Criminal Code.

In all family cases, guardians ad litem must identify whether domestic abuse is present. Domestic abuse is a crucial area of inquiry in addressing custody and physical placement even if it is not yet known whether there is a dispute between the parents. Recommending ongoing contact between children and a violent ex-spouse may create increased opportunities for domestic abuse through exchanges of children and periods of physical placement. Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, 50 Juv. & Fam. Ct. J. 13, 13–25 (1999). In extreme cases, domestic abuse may be lethal. The lethality of domestic abuse often increases when the abuser believes that the victim is leaving or has left the relationship. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 Nat'l Inst. of Just. J. 14, 14–19 (2003), <https://www.ojp.gov/pdffiles1/jr000250e.pdf>; Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1089–97; Neil Websdale, *Reviewing Domestic Violence Deaths*, 250 Nat'l Inst. of Just. J., 26, 26–31 (2003), <https://www.ojp.gov/pdffiles1/jr000250g.pdf>. In some cases, children themselves may become victims or be involved as witnesses to homicide. Kelly Starr & Jake Fawcett, *If I Had One More Day ... Findings and Recommendations from the Washington State Domestic Violence Fatality Review* 30–31 (2006), <https://wscadv.org/wp-content/uploads/2016/12/2006-dvfr-report.pdf>.

Step One starts with the use of a screening tool. It is important for guardians ad litem to know what they are looking for and why—and to use tools that are designed to get at the needed information. The national study group developed a tool for use by guardians ad litem to detect domestic abuse. In all family law cases, guardians ad litem should start by using the initial screening tool in the *BWJP Guides*, *supra*. If, after initial screening, the guardian ad litem determines there are several red flags that might indicate that domestic abuse is occurring in this home, the guardian ad litem should then move on to a series of questions to continue the identification of abuse.

The *Domestic Abuse Guidebook* contains suggested questions, methods of investigation, interview tips, and resources to corroborate whether domestic abuse exists. It contains an explanation as to what is not domestic abuse. It also contains a critical segment entitled “Distinguishing between domestic abuse, high conflict, and normal conflict of separating couples.”

V. Step Two: Define the Nature and Context of Abuse

While identifying domestic abuse is an important first step, guardians ad litem need to know more specifically what is actually going on—what is the nature and context of the abuse? Guardians ad litem need to know who is doing what to whom, why, and to what effect.

To understand the nature and context of the abuse, a guardian ad litem must explore the following:

1. Abuse of the victim, including interference with the victim's access to resources, decision-making authority, and freedom from unwanted intrusion;
2. Any children's experience of the violence, including direct harm from the abuse, direct observation of the abuse, intervention of abuse, and the impact of witnessing or experiencing the abuse; and
3. The ability of the abusive parent to appropriately parent, including the ability to provide emotional support to the children, protect the children from emotional or physical harm, respond to the children's needs, and support the children's relationship with and support the parental authority of the non-abusive parent.

Step Two of the *Domestic Abuse Guidebook* examines each of the above issues. It starts with an examination of the common forms of domestic abuse such as physical, sexual, and financial. Any of these forms of abuse can trigger [Wis. Stat. § 767.41\(2\)\(d\)1.](#), which directs that if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.

In addition, Step Two explores coercive control—a series of controlling and coercive tactics used by an abuser—as a form of domestic abuse. The result is a person who is not able to make the person's own decisions. The *Domestic Abuse Guidebook* gives specific examples as to how coercive control affects parenting by both the abusive and protective (non-abusive) parent.

Evidence of coercive control can trigger an important custody presumption: that the parties will not be able to cooperate in future decision-making. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child's best interests, it forms the basis for awarding a party sole custody under [Wis. Stat. § 767.41\(2\)\(b\)](#).

Step Two also examines the coercive control tactics abusers use to attempt to have the guardian ad litem control the victim. If a guardian ad litem is not aware that an abuser is often skillful at drawing others into collusion with the abuser's behavior, the guardian ad litem might not recognize that the GAL is being used to exert more control over the victim and the proceedings.

Next, Step Two contains lengthy information as to how children are affected by witnessing or experiencing domestic abuse in the home. Finally, Step Two of the *Domestic Abuse Guidebook* provides guardians ad litem with multiple resources to help to determine a parent's ability to parent or co-parent. Research notes that

1. Batterers tend to view the world only from their perspective and do not consider the needs of the other parent and children as being equal.
2. Batterers tend to use the same tactics against children as against the other parent.

The discussion of Step Two in the *Domestic Abuse Guidebook* contains many pages of information to assist the guardian ad litem in assessing the impact of domestic abuse on children. Because a guardian ad litem is making recommendations as to what is in the children's best interests, this information is crucial to gather and present to the court to support whether each parent is able to engage in co-parenting.

Step Two of the *Domestic Abuse Guidebook* also discusses at length parenting in the context of abuse. It examines both the risks to children when being raised by an abusive parent and the inability of a protective parent to engage in the best parenting when being subjected to abuse. Perhaps the single most important issue a guardian ad litem can present to the court is why a parent is or is not able to appropriately co-parent. Step Two provides extensive information to guardians ad litem on this issue.

VI. Step Three: Evaluate the Implications of the Abuse by Assessing the Best Interests of the Child

After identifying that domestic abuse is present and fully defining the nature and context of the abuse, the guardian ad litem must evaluate the implications of the abuse.

A. **The *Domestic Abuse Guidebook* reminds guardians ad litem of the four overriding statutory principles that guide direct custody and placement decision-making.**

1. If the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under [Wis. Stat. § 940.19](#) or [940.20\(1m\)](#), or domestic abuse, as defined in [Wis. Stat. § 813.12\(1\)\(am\)](#), there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. [Wis. Stat. § 767.41\(2\)\(d\)1.](#)
2. [Wis. Stat. § 767.41\(5\)\(bm\)](#) directs that if the court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, "the safety and well-being of the child and the safety of the parent who was the victim of the battery shall be the paramount concerns in determining legal custody and periods of physical placement."
3. The guardian ad litem must also consider whether the parties cannot cooperate in future decision-making. Evidence of domestic abuse can also create the presumption that the parties will not be able to cooperate in future decision-making. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child's best interests, such as in coercive control cases, a court can award a party sole custody under [Wis. Stat. § 767.41\(2\)\(b\).](#)
4. The guardian ad litem must also consider whether there is evidence of child abuse, which can create the presumption that the parties will not be able to cooperate in future decision-making. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child's best interests, a court can award a party sole custody under [Wis. Stat. § 767.41\(2\)\(b\).](#)

B. **Once the correct statutory framework for custody and placement decision-making has been identified, guardians ad litem consider all facts relevant to the best interest of the child.**

In Step Three, guardians ad litem examine all the best-interest factors enumerated in [Wis. Stat. § 767.41\(5\)\(am\).](#)

This analysis begins with the impact of domestic abuse on children. The presence of domestic abuse is also an indicator for the co-existence of child maltreatment. Researchers estimate that the overlap between domestic abuse and child physical or sexual abuse ranges from 30% to 60%. Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 *Violence Against Women* 134, 134–54 (1999); Linda M. Williams, *Understanding Child Abuse and Violence Against Women*, 18 *J. of Interpersonal Violence* 441, 441–51 (2003). Furthermore, the more severe and fatal cases of child abuse overlap with domestic abuse. Susan Schechter & Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies* (1994); see also Child Abuse & Neglect Prevention Bd., *Adverse Childhood Experiences in Wisconsin: 2011–2015: Behavioral Risk Factor Survey Findings* (2018), <https://preventionboard.wi.gov/Documents/ACE-Brief-2018FINAL.pdf>. Research indicates there are long-term health effects from experiences of domestic abuse during childhood. Ann L. Coker et al., *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*, 9 *Archives of Fam. Med.* 451, 451–57 (2000). Child exposure to domestic abuse is considered an adverse childhood experience and has been linked to numerous negative physical and mental health outcomes in adulthood. Cailin O'Connor et al., Wisconsin Children's Trust Fund, *Adverse Childhood Experiences in Wisconsin: Findings from the 2010 Behavioral Risk Factor Survey* (2012).

Because domestic abuse affects the well-being of children, it is crucial that guardians ad litem have an accurate picture of the abuse perpetrated by one parent against the other parent or against a child, and to consider its implications for the best interests of the child after the parents separate. It is also important to understand that the impact of domestic abuse on children is often mitigated by certain protective factors, such as a supportive relationship with the non-abusive parent. See Peter G. Jaffe et al., *Child Custody & Domestic Violence: A Call for Safety and Accountability* 27–28 (2003) (providing a table that identifies risk factors and protective factors in domestic violence cases and stating that domestic violence should be a fundamental consideration in determining the best interests of children).

Next, a guardian ad litem must consider the impact of domestic abuse on parenting abilities by both parents. Most domestic abusers have not had ongoing anger or out-of-control problems outside their intimate-partner relationships. Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent—Addressing the Impact of Domestic Violence on Family Dynamics* (2002). Both adult and adolescent abusers bring certain expectations of who is to be in charge and what mechanisms are acceptable for enforcing that dominance into their intimate relationships. It is those attitudes and beliefs, rather than victims' behavior, that determine whether persons are violent. Lundy Bancroft, *Why Does He Do That? Inside the Minds of Angry and Controlling Men* (2002).

Finally, the guardian ad litem may assess and consider the lethality risk of domestic abuse. Dr. Jacquelyn Campbell's research found that women who were threatened or assaulted with a gun were 20 times more likely than other women to be murdered. Jacquelyn Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 *Nat'l Inst. for Just. J.* 14, 17 (2008), <https://www.ojp.gov/pdffiles1/jr000250e.pdf>. Women whose partners threatened them with murder were 15 times more likely than other women to be killed. *Id.* The study identified the following as the top five risk factors for homicide among abused women (with the numbers in parentheses indicating “the likelihood of being in the homicide versus the abused group”):

1. Threats or use of a weapon (20.2);
2. Threats to kill (14.9);
3. Strangulation (9.9);
4. Perpetrator violently and constantly jealous (9.2); and
5. Forced sex (7.6).

Id.

VII. Step Four: Make Informed Recommendations That Account for Domestic Abuse

Once all of the information about domestic abuse has been collected and analyzed, the final step for guardians ad litem is to make informed recommendations that account for the abuse to better guarantee the long-term safety of the children and protective parent.

[Wis. Stat.](#) § 767.407(4) requires guardians ad litem to investigate whether there is evidence that either parent has engaged in interspousal battery or domestic abuse and report the results of the investigation to the court. Once a guardian ad litem has investigated whether there is evidence that either parent has engaged in interspousal battery or domestic abuse, [Wis. Stat.](#) § 767.407(4) requires the guardian ad litem to report the results of the investigation to the court. This is significant for two reasons:

1. [Wis. Stat.](#) § 767.41(2)(d)1. directs that if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.
2. [Wis. Stat.](#) § 767.41(5)(bm) directs that if the court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, “the safety and well-being of the child and the safety of the parent who was the victim of the battery shall be the paramount concerns in determining legal custody and periods of physical placement.”

After conducting an investigation, if the guardian ad litem determines that domestic abuse exists, the guardian ad litem should request that the court make a finding of domestic abuse under [Wis. Stat.](#) § 767.41(5)(bm) and (2)(d)1. This allows the court to make orders that account for the safety of the children as noted directly above.

When a guardian ad litem discovers domestic abuse, the *Domestic Abuse Guidebook* notes the guardian ad litem must create recommendations that address safety in all these categories:

1. Custody;
2. Placement;
3. Supervised or monitored placement;
4. Transfer of placement;
5. Communication between the parents;
 - a. Communication via online resources;
 - b. Communication via the children;
 - c. Communication about the other parent; and
 - d. Communication regarding the children’s annual calendar;
6. Children’s welfare;
 - a. Provisions to promote the children’s welfare;
 - b. Discipline of the children;
7. Home environment;
8. Internet, social media, and other technology;
9. Parental provisions, including
 - a. Child support;
 - b. Education and treatment; and
 - c. Weapons restrictions; and
10. Other conditions for the safety and well-being of the children and non-abusive parent.

Possible Provisions Within Custody and Placement Orders to Enhance Safety.

Courts have ample statutory guidance to make orders that enhance the safety and well-being of the child and the adult domestic abuse victim; these conditions are found at [Wis. Stat.](#) § 767.41(6)(g). When the court makes a finding of domestic abuse, the statute mandates that the court impose “one or more of the [conditions], as appropriate.” The statute does not limit the ability of the court to order these or similar conditions, in its discretion, in other cases.

1. Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate third party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for that party’s actions with respect to the responsibility;
2. Requiring the child’s periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate third party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for that party’s actions with respect to the responsibility;
3. Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement;
4. Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising that

party's periods of physical placement;

5. If the party who committed the battery or abuse has a significant problem with alcohol or drug abuse, prohibiting that party from being under the influence of alcohol or any controlled substance when the parties exchange the child for periods of physical placement and from possessing or consuming alcohol or any controlled substance during that party's periods of physical placement;
6. Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child;
7. Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child; and
8. Imposing any condition not specified above that the court determines is necessary for the safety and well-being of the child or the safety of the party who was the victim of the battery or abuse.

In drafting custody and placement recommendations, especially in cases in which domestic abuse is present, it is important to be as specific as possible. Recommendations should provide for structure, limits, and predictability. Recommendations should provide specific times and processes in each category (e.g., length, frequency, timelines for responses, consequences for failure to comply, such as calling law enforcement or asking the court to schedule an emergency hearing, etc.). Making the recommendations specific and clear can help reduce the degree of coercive control the abuser can exercise over the victim once the family case ends.

The *Domestic Abuse Guidebook* is designed to guide guardians ad litem to apply a consistent and thorough analysis of the impact of domestic abuse on the children and the parenting abilities of both parents. It is intended to allow guardians to fully explore what is in the best interests of children and present that information to the court through informed recommendations.

Chapter 4

Juvenile Court: Wis. Stat. Ch. 48

[Samantha S. Wagner](#)

I. Scope [§ 4.1]

This chapter acquaints the attorney who has been appointed as a guardian ad litem in juvenile court with the practices and procedures under [Wis. Stat.](#) ch. 48—the Children's Code. For a thorough discussion of juvenile law in Wisconsin, see Katie York et al., [Wisconsin Juvenile Law Handbook](#) (State Bar of Wis. 5th ed. 2022) [hereinafter [Wisconsin Juvenile Law Handbook](#)]. This chapter discusses the role of the guardian ad litem in cases involving CHIPS, unborn children in need of protection and services (UCHIPS), and juveniles in need of protection or services (JIPS) and the various issues that arise in such cases, such as jurisdiction and venue, the petition, preadjudication issues, hearings, and, in CHIPS cases, children with special needs. In addition, the chapter examines miscellaneous proceedings under [Wis. Stat.](#) ch. 48, such as minor guardianships of the person. This chapter also includes a discussion of voluntary and involuntary termination of parental rights (TPR), including the procedural issues involved with TPR. Independent adoption and its procedural rules are also discussed.¹

Note. The phrase *termination of parental rights* and the abbreviation *TPR* are used interchangeably throughout this chapter, as are the terms *children in need of protection or services* and *CHIPS*.

This discussion is not meant to be an exhaustive study of the law, nor does it purport to address all aspects or functions of the juvenile court. The attorney should use it as a guide, supplement it by studying the statutes and case law, and discuss local procedures with others practicing in the same jurisdiction.

The juvenile court is a statutory court, and it is therefore essential that the guardian ad litem be familiar with the current Children's Code, [Wis. Stat.](#) ch. 48, and the case law as it develops. Occasionally, decisions issued by the state courts in other jurisdictions and by the federal courts are pertinent. In general, however, [Wis. Stat.](#) ch. 48, including section footnotes, provides the answers to practical questions about how to proceed in juvenile court.

Caution. Throughout this chapter, numerous references to various time periods are found, such as those for filing petitions and holding hearings. The reader is cautioned that certain time periods may be different for Indian children pursuant to [Wis. Stat. § 48.299\(9\)](#). Accordingly, at the outset of any [Wis. Stat. ch. 48](#) juvenile case, the guardian ad litem should ascertain whether the child is considered to be an Indian child under the Wisconsin Indian Child Welfare Act (WICWA). See [Wis. Stat. §§ 48.028, 48.299\(9\)](#); see also 25 [U.S.C. §§ 1901–1963](#) (the federal Indian Child Welfare Act (ICWA)). If the child falls within the scope of WICWA, the guardian ad litem should not rely on the time periods set forth in this chapter for non-Indian children but should use [Wis. Stat. § 48.299\(9\)](#) to determine applicable deadlines. In every case, the guardian ad litem should ask whether the child subject to the court’s jurisdiction is subject to ICWA or WICWA.

II. Legislative Purpose of Wis. Stat. Ch. 48 [§ 4.2]

The legislative purpose of the Children’s Code is multifold and expressly stated at the opening of [Wis. Stat. § 48.01](#). In every case, “the best interests of the child or unborn child shall always be of paramount consideration.” [Wis. Stat. § 48.01\(1\)](#). To revisit the Wisconsin Legislature’s intentions as each case unfolds will guide the guardian ad litem through the statute’s balance of myriad goals and interests.

[Wis. Stat. § 48.01](#) reflects the legislature’s concern that, when the Children’s Code applies, its procedures should be activated as quickly as circumstances will allow. The statute urges courts and agencies to “[eliminate] the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family.” [Wis. Stat. § 48.01\(1\)\(a\)](#). [Wis. Stat. § 48.01\(1\)\(gg\)](#) promotes “the adoption of children into safe and stable families rather than allowing children to remain in the impermanence of foster care.” [Wis. Stat. § 48.01\(1\)\(gr\)](#) allows “for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts are discontinued in accordance with [[Wis. Stat. ch. 48](#)] and [when] termination of parental rights is in the best interest of the child.”

The federal Adoption and Safe Families Act (ASFA) requires that for a child who has been in foster care under the responsibility of a child welfare agency for 15 of the most recent 22 months, the state must file a termination of parental rights, unless the child is being cared for by a relative, the case plan has documented that a termination would not be in the child’s best interests, or the child welfare agency has not provided the family with the services necessary for reunification. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a), 111 Stat. 2115, 2118 (codified in part at 42 [U.S.C. § 675\(5\)\(E\)](#)). The Wisconsin Statutes have incorporated this requirement. See, e.g., [Wis. Stat. § 48.417\(1\)\(a\)](#).

Practice Tip. The guardian ad litem should be particularly familiar with [Wis. Stat. §§ 48.02, 48.023, 48.025, 48.027, and 48.028](#). A reading of these sections should be sufficient to provide the guardian ad litem with a general background for the rest of the Children’s Code. [Wis. Stat. §§ 48.03, 48.035, 48.04, 48.06, 48.067, 48.069, 48.08, 48.09, 48.10, and 48.11](#) outline some general procedures and are worth reviewing.

The Children’s Code reflects a legislative policy in cases of children in need of protection or services of identifying and notifying adult relatives (grandparents, great-grandparents, aunts, uncles, and siblings (including half-siblings)), whether by blood, marriage, or legal adoption, and of keeping siblings in the same placement (or in frequent contact with each other if the same placement is not possible) when children are placed outside the home. As an extension of the belief that children should be with family, the Wisconsin Legislature, working with key child welfare agencies, expanded familial placement options for children by enacting 2023 Wis. Act 119. The act added a definition of “like-kin” to [Wis. Stat. ch. 48](#) to include an individual who has a significant emotional relationship with a child or the child’s family that is similar to a familial relationship. [Wis. Stat. § 48.02\(12c\)](#), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). A like-kin placement cannot be with an individual who is or has been the child’s licensed foster parent. *Id.* An important part of this change is that a like-kin individual need not be licensed as a foster home to be a placement for a child and is eligible for financial assistance as a kinship care provider, which includes “a relative other than a parent, an extended family member, as defined in [[Wis. Stat. § 48.028\(2\)\(am\)](#)], or like-kin. [Wis. Stat. § 48.57\(3m\)\(a\)2.](#), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

The guardian ad litem must look to relatives and evaluate sibling relationships in making recommendations to the court about the child’s or unborn child’s best interests at every level, including emergency hearings, initial and pretrial appearances, and the dispositional hearing. The guardian ad litem should continue to monitor the placement and sibling relationships through the various postdisposition phases, including permanency planning, placement changes, trial reunification, and an extension or termination of a dispositional order.

When the court appoints a guardian ad litem for an Indian child, *see* [Wis. Stat.](#) § 48.02(8g), the guardian ad litem's central function is to make recommendations that reflect the unique value of the child's Indian culture. To that end, the guardian ad litem must look to the adult Indian relatives and like-kin, as well as the child's Indian tribe, in recommending placement or frequent contact with the child's Indian siblings.

As part of the statutory requirements for placement of a child in a qualified residential treatment program (QRTP), the Children's Code allows for a residential care center, group home, or shelter care facility to be certified as a QRTP. [Wis. Stat.](#) § 48.675(1). The corresponding rules of the Department of Children and Families (DCF) are found in [Wis. Admin. Code](#) ch. DCF 61.

III. The Guardian ad Litem in Juvenile Court [§ 4.3]

A. Appointment [§ 4.4]

The presiding judge appoints a guardian ad litem as early in the proceedings as possible to represent the best interests of a child (or other appropriate person) or unborn child in a proceeding under [Wis. Stat.](#) ch. 48. *See* [Wis. Stat.](#) § 48.235(1). Generally, the appointment is made upon the filing of the petition for CHIPS, UCHIPS, JIPS, TPR, adoption, or guardian of the person for a child; occasionally, it is made before the emergency custody hearing, if there is one. The newly appointed guardian ad litem should begin work immediately on the case. The guardian ad litem's appointment terminates at the issuance of a final order or upon the termination of any appeal in which the guardian ad litem participates, but the court may, upon request, extend the appointment. [Wis. Stat.](#) § 48.235(7).

The standard court form for an order appointing a guardian ad litem or attorney under [Wis. Stat.](#) ch. 48, Children's Code, and [Wis. Stat.](#) ch. 938, Juvenile Justice Code, is [JD-1798A](#). The standard court form for consent to act as guardian ad litem or attorney under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 is [JD-1798B](#). The forms can be downloaded from the Wisconsin Court System's website, at <https://www.wicourts.gov/forms1/circuit/>. In most cases under the Children's Code, this appointment will be ordered by the court for a child or unborn child alleged to need protection or services under [Wis. Stat.](#) § 48.13 or 48.133, a child who is the subject of a TPR proceeding under [Wis. Stat.](#) § 48.41 or 48.415, or a child who is the subject of an independent adoption proceeding under [Wis. Stat.](#) § 48.837. [Wis. Stat.](#) § 48.235(1)(b) also requires that a minor birth parent who petitions for voluntary TPR be represented by a guardian ad litem. *See also* [Wis. Stat.](#) § 48.23(2). A nonpetitioning minor birth parent whose rights may be terminated involuntarily, and who appears before the court, must be represented by advocacy counsel. *Id.* No minor birth parent may waive counsel. *Id.* An incompetent parent in a TPR proceeding must have a guardian ad litem appointed, pursuant to [Wis. Stat.](#) § 48.235(1)(g). [Wis. Stat.](#) § 48.235(1)(a) provides that the court may appoint a guardian ad litem in any appropriate matter under [Wis. Stat.](#) ch. 48. Therefore, the judge may choose to appoint a guardian ad litem for a nonpetitioning minor birth parent in an involuntary TPR or in any other [Wis. Stat.](#) ch. 48 proceeding; however, such appointments are in addition to, not in lieu of, the appointment of advocacy counsel. A guardian ad litem must also be appointed, pursuant to [Wis. Stat.](#) § 938.235, when there is an allegation of habitual truancy, or when a juvenile under 10 years of age is alleged to have committed a delinquent act, if there is a recommendation for out-of-home placement. *See* [Wis. Stat.](#) § 938.235(1)(e) (requiring appointment "for any juvenile alleged or found to be in need of protection or services"); *see also* [Wis. Stat.](#) § 938.13 (describing grounds for finding juvenile in need of protection or services (JIPS)). Most courts automatically appoint a guardian ad litem when these allegations are made, irrespective of the ultimate or intended placement.

Note. [Wis. Stat.](#) ch. 938, the Juvenile Justice Code, is generally outside the scope of this chapter, although there is often an overlap between [Wis. Stat.](#) chs. 48 and 938.

Occasionally, the court will appoint a guardian ad litem if a child or a juvenile is alleged to be in need of protection or services or delinquent, is 12 years old or older, and appears not competent to make decisions. Such appointments do not eliminate the need for advocacy counsel.

B. Qualifications and Responsibilities [§ 4.5]

1. Statutory Provisions and Supreme Court Rules [§ 4.6]

The guardian ad litem in [Wis. Stat.](#) ch. 48 cases must be licensed to practice law in Wisconsin. [Wis. Stat.](#) § 48.235(2). The guardian ad litem must not be an interested party in the proceeding, appear as counsel or court-appointed special advocate in the

proceeding on behalf of any party, or be a relative or representative of an interested party. *Id.*

The Wisconsin Supreme Court requires that an attorney who wishes to be appointed as a guardian ad litem in juvenile cases must have completed a total of 30 hours of guardian ad litem training, [SCR 35.01\(1\)](#), or 6 hours of guardian ad litem training during the combined current reporting period at the time the attorney accepts the appointment and the immediately preceding reporting period. [SCR 35.01\(2\)](#). Only in “exceptional or unusual circumstances” may a court appoint a guardian ad litem who has not completed the requisite training. [SCR 35.01\(3\)](#).

Under [SCR 20:4.5](#),

A lawyer appointed to act as a guardian ad litem or as an attorney for the best interests of an individual represents, and shall act in, the individual’s best interests, even if doing so is contrary to the individual’s wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct that are consistent with the lawyer’s role in representing the best interests of the individual rather than the individual personally.

[SCR 20:4.5](#) thus expressly recognizes that a lawyer who represents the best interests of the individual does not have a client in the traditional sense but must comply to the extent the Rules of Professional Conduct apply.

The guardian ad litem must be an advocate for the best interests of the child or unborn child. [Wis. Stat.](#) § 48.235(3). The guardian ad litem functions independently, in the same manner as an attorney for a party, including the responsibility to serve appropriate documents, to advocate in accordance with the rules of evidence, to avoid ex parte communication, and the like. The guardian ad litem must consider, but is not bound by, the child’s wishes or other persons’ positions with respect to the best interests of the child. [Wis. Stat.](#) § 48.235(3)(a). If the guardian ad litem determines that the best interests of the child are substantially inconsistent with the child’s wishes, the guardian ad litem must inform the court; the court may then appoint advocacy counsel to represent the child. *Id.* The guardian ad litem has none of the rights or duties of a general guardian. *Id.*

Note. The term “best interests” must not be used to communicate with the jury in [Wis. Stat.](#) ch. 48 fact-finding hearings. But the guardian ad litem or the court may tell the jury that the guardian ad litem represents the “interests” of the person or unborn child for whom the guardian ad litem was appointed. [Wis. Stat.](#) § 48.235(6); *Waukesha Cnty. Dep’t of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, [124 Wis. 2d 47](#), 70, [368 N.W.2d 47](#) (1985).

A guardian ad litem for a child in a CHIPS case under [Wis. Stat.](#) § 48.13 or for an unborn child in a UCHIPS case under [Wis. Stat.](#) § 48.133 must, unless granted leave by the court not to do so, meet with the child or expectant mother of an unborn child, determine the appropriateness and safety of the child’s or unborn child’s environment, and determine the child’s placement objectives. [Wis. Stat.](#) § 48.235(3)(b)1. The guardian ad litem must also make clear and specific recommendations to the court about the child’s or unborn child’s best interests throughout the proceedings. [Wis. Stat.](#) § 48.235(3)(b)2.

Note. The statement of guardian ad litem, circuit court Form [JD-1799](#), delineates the guardian ad litem’s specific duties of investigation required in CHIPS and JIPS cases. Specifically, the guardian ad litem must (1) meet with the child or juvenile; (2) interview the child or juvenile; (3) assess the child’s or juvenile’s environment; and (4) state whether the best interests of the child or juvenile are or are not substantially inconsistent with the child’s or juvenile’s wishes. After fulfilling these duties, the guardian ad litem may complete and sign the form and submit it to the court and parties.

For the guardian ad litem in a postdispositional proceeding (after the court has issued its dispositional order in a CHIPS action), if the court under [Wis. Stat.](#) § 48.235(7) continues the appointment of the guardian ad litem or reappoints the guardian ad litem, [Wis. Stat.](#) § 48.235(4)(a) sets forth an array of responsibilities. Specifically, the guardian ad litem may do any of the following: (1) participate in the permanency planning for the child; (2) petition for a change in placement; (3) petition for TPR; (4) petition for revision; (5) petition for extension; (6) petition for a temporary restraining order and injunction; (7) petition for relief from a judgment terminating parental rights; (8) petition for the appointment or removal of a guardian or revision of a guardianship order under [Wis. Stat.](#) § 48.977; (9) bring an action for a determination of the child’s paternity; and (10) perform any other duties consistent with the provisions of the Children’s Code. [Wis. Stat.](#) § 48.235(4)(a); cf. [Wis. Stat.](#) § 48.235(4m)(a) (describing guardian ad litem’s postdispositional responsibilities in UCHIPS case). The court must order the agency primarily responsible for providing services to the child to notify the guardian ad litem regarding actions taken during the guardian ad litem’s appointment in a CHIPS case. [Wis. Stat.](#) § 48.235(4)(b); cf. [Wis. Stat.](#) § 48.235(4m)(b) (UCHIPS). Agency notifications are a means for the guardian ad litem to stay informed of changes involving the child’s best interest.

For the guardian ad litem appointed to represent the best interests of a minor parent whose parental rights are the subject of a voluntary TPR proceeding, [Wis. Stat. § 48.235\(5\)](#) sets forth specific responsibilities. The guardian ad litem must interview the minor parent, investigate the reason for TPR, assess the voluntariness of the consent, and inform the minor parent of that person's rights and of the alternatives to, and the effect of, TPR. [Wis. Stat. § 48.235\(5\)](#).

For the guardian ad litem appointed to represent an incompetent parent in a contested TPR proceeding, [Wis. Stat. § 48.235\(5m\)](#) delineates the guardian ad litem's responsibilities. As a threshold matter, [Wis. Stat. § 48.235\(1\)\(g\)](#) requires the court to appoint a guardian ad litem if any assessment or examination of the parent ordered under [Wis. Stat. § 48.295\(1\)](#) shows that the parent is not competent to participate in the TPR proceeding or to assist the parent's counsel or the court in protecting the parent's rights. The guardian ad litem must provide information to the court relating to the parent's competency to participate in the proceeding and must also assist the court and the parent's adversary counsel in protecting the parent's rights in the proceeding. [Wis. Stat. § 48.235\(5m\)\(a\)](#).

Note. In jury trials for contested TPR proceedings, the guardian ad litem cannot participate as a party and cannot call witnesses, provide opening statements or closing arguments, or participate in any activity at trial that is required to be performed by the parent's adversary counsel. [Wis. Stat. § 48.235\(5m\)\(b\)](#). The guardian ad litem or the court may tell the jury that the guardian ad litem represents the "interests" of the person or unborn child for whom the guardian ad litem was appointed. [Wis. Stat. § 48.235\(6\)](#).

For the guardian ad litem appointed in an action for the guardianship of a child's person, the children's court under [Wis. Stat. ch. 48](#) exercises jurisdiction. In general, the guardian ad litem is appointed in proceedings to appoint a guardian or terminate a guardianship, as well as in proceedings to modify a guardianship if a hearing will be held. [Wis. Stat. § 48.9795\(3\)](#); *see also* [Wis. Stat. § 48.235\(1\)\(c\)](#). The guardian ad litem represents the child's best interests in court and throughout the proceedings. [Wis. Stat. § 48.9795\(3\)\(b\)](#). Alongside the specific duties and responsibilities required of a guardian ad litem under [Wis. Stat. ch. 48](#), the guardian ad litem must conduct a diligent investigation specific to the circumstances, including, personally or through a trained designee, meeting with or observing the child, meeting with any proposed guardian and interested persons, and visiting the homes of the child and the proposed guardian. The guardian ad litem must attend all court proceedings relating to the guardianship; present evidence concerning the child's best interests, if necessary; and make clear and specific recommendations at every stage of the proceedings. *Id.*

The guardian ad litem is bound by the same procedural rules that apply to other juvenile court participants. Because all proceedings in juvenile court are confidential (the identity of the parties, the contents of documents, the testimony elicited in court), and the information revealed during the case must not be divulged to any nonparty or professional not directly involved in the proceedings, unless excepted by statute (*see, e.g., Wis. Stat. § 48.78(2)*), the guardian ad litem must be careful to follow these procedural rules. *See Wis. Stat. § 48.299(1)–(5)*.

2. Guiding Principles [§ 4.7]

The guardian ad litem has information-gathering and investigative responsibilities while providing zealous legal representation and advocacy in juvenile court cases. The guardian ad litem should first review the petition to become familiar with the allegations and circumstances of the case. It is good practice for the guardian ad litem to contact the social worker immediately upon reviewing the petition.

Note. In most cases, a social worker with the human services agency of the county of venue will be, or will have been, assigned to the case. It is wise to obtain various telephone numbers and contact persons from the agency.

The social worker should be able to provide background information about the child, the child's family, and the circumstances surrounding the filing of the petition. (When the case is about an unborn child, most of these principles are still applicable.) The social worker should also have helpful information, such as the telephone number at which the child and the parents may be reached. If the child is in foster care, the social worker will be able to provide the foster parents' names, address, and telephone number. The social worker may also be able to give the names and locations of teachers, therapists, and relatives who might be able to provide important information.

The guardian ad litem should assess the social worker's attitude toward the child and the family. At this point, the guardian ad litem should keep an open mind about the child's ultimate disposition. The guardian ad litem should not be swayed by a social worker who may already have decided that the child will not ever return home or who might not have the energy or motivation to explore alternatives to an unhealthy home situation.

Practice Tip. No formal rules exist for substitution of the social worker. If the guardian ad litem has a substantial, compelling basis to believe substitution is imperative, then the guardian ad litem should first ask the county social services agency to assign another social worker to the case. When requesting substitution of a social worker, it is advisable for the guardian ad litem to provide a material basis, such as documentation of a conflict of interest or relevant information available on the Wisconsin Circuit Court Access (CCAP) website. If that fails, a well-substantiated motion to the court may be effective.

After contacting the social worker, the guardian ad litem should arrange to visit the child by contacting the parents or other designated custodian or placement provider. The social worker may assist in arranging contact. The guardian ad litem should use good judgment to assess the immediacy of meeting with the child, parents, and other interested parties. Also, the guardian ad litem should determine whether direct telephone contact is necessary or whether there is enough time for written correspondence. In contacting parents, the guardian ad litem should state that the guardian ad litem's role is to represent the child's interests in the juvenile court action and not to provide legal advice to any party. It is imperative ethically for the guardian ad litem to ascertain whether parents are represented by counsel. If parents are not represented by counsel, the guardian ad litem should inform them of the right to obtain legal representation and the right not to speak with the guardian ad litem before consulting with an attorney. If the parents are represented by an attorney, the guardian ad litem *must* contact each parent's attorney before contacting the parents by telephone or letter and obtain the attorney's specific approval of a request to contact the parent. Once a parent's attorney has given permission for direct contact between the guardian ad litem and the parent, a meeting should be arranged as soon as possible.

The guardian ad litem's role necessarily concerns the completeness of the proceedings. For example, the petition may state that the father is unknown, but this does not necessarily mean that the father is unknown to the mother; it may indicate only that the father's name is unknown to the law enforcement officer or the social worker, possibly because it was not requested. Similarly, the child's legal paternity might not have been established. The guardian ad litem should be prepared to recommend, in the child's best interests, genetic testing of any alleged fathers and to determine whether paternity has been adjudicated or acknowledged, *see* [Wis. Stat. § 767.805](#). An adjudicated father is a party to proceedings under the Children's Code and must receive notice in the same manner as the mother. *See* [Wis. Stat. § 48.02\(13\)](#) (defining *parent*). The guardian ad litem might want to review the procedure to establish paternity based on genetic tests. *See* [Wis. Stat. §§ 767.804, 891.407](#) ("Presumption of paternity based on genetic test results").

Under [Wis. Stat. § 48.27\(3\)\(b\)1.](#), in CHIPS proceedings (and UCHIPS cases involving a child expectant mother), the court must notify

1. A person who has filed a declaration of paternal interest under [Wis. Stat. § 48.025](#); and
2. A person alleged to the court to be the child's father or who may, based on the statements of the mother or other information presented to the court, be the father.

This notice is mandatory unless a physician attests to a belief that the child was conceived as a result of a sexual assault. [Wis. Stat. § 48.27\(3\)\(b\)2.](#)

Note. Notice of the proceedings may, in certain cases, be sent to more than one man when the mother reports having had sexual intercourse with more than one man during the presumed period of conception of the child.

In investigating the child's best interests, the guardian ad litem should obtain and review confidential records that might contain helpful data. In addition to the petition, social services reports regarding intake and other investigations should be reviewed. Law enforcement reports, if any, should be obtained under [Wis. Stat. § 48.293](#). Persons entitled to inspect the records may obtain copies of the records with the permission of the custodian of the records or with permission of the court under [Wis. Stat. § 48.293\(2\)](#). The guardian ad litem in a proceeding for a guardianship of the person for a child should review the duties, including those relating to the investigation of the child's records, in [Wis. Stat. § 48.9795\(3\)](#). *See generally infra* [§ 4.73](#).

A court-ordered physical, psychological, mental, or developmental examination or an alcohol and other drug abuse assessment "shall" be available through the court to counsel or guardian ad litem for the child. [Wis. Stat. § 48.295](#). If the child's school or treating

physician has reports that might be helpful, the guardian ad litem should obtain them. The guardian ad litem requests authorization forms that comply with all applicable federal and state laws, regulations, and administrative rules from medical, educational, and other entities for release of confidential information for parents and others to sign.

Practice Tip. To facilitate access to confidential records, the guardian ad litem is well-advised in each case to verify that the judge or court commissioner has checked the box on the order appointing guardian ad litem, Form [JD-1798A](#), ordering that the “guardian ad litem shall be provided access” to

all records in possession of juvenile intake, the county or state department, child welfare agencies, schools, or law enforcement agencies pertaining to the ... captioned case, regardless of the originating source, including but not limited to, medical, mental health, psychological, counseling, drug or alcohol records from a non-federally assisted program as defined in 42 CFR Part 2, financial, educational, employment, probation, and law enforcement records.

Entities from which the guardian ad litem seeks to obtain records often require a separate order signed by the judge for each child. The court may also order that the guardian ad litem be provided access to other records by checking the box on Form [JD-1798A](#) for “the following records” and naming those particular records.

Note. Guardians ad litem should take precautions to adhere to the confidentiality provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, with respect to medical records. The effect of HIPAA is beyond the scope of this chapter. In general, however, HIPAA places significant restrictions on the dissemination of medical records. A guardian ad litem who comes into possession of medical records (relating to physical or mental health, alcohol and other drug abuse (AODA), etc.) should not provide copies to others involved in a case in the absence of either a court order or a valid, signed, HIPAA-compliant authorization form.

The guardian ad litem should also interview the significant people in the child’s life as part of the information-gathering process. Significant people may include witnesses to the alleged incidents described in the petition, relatives, neighbors, family friends, the child’s friends, foster parents, teachers, child-care providers, law enforcement officers, health-care providers, and mental-health professionals.

Practice Tip. Everyone involved in a case under [Wis. Stat.](#) ch. 48 should keep in mind that the guardian ad litem cannot be a witness in the case and that the guardian ad litem gathers information for the purpose of legal representation. When it is advisable to have a witness to an interview, home visit, or other purpose, the guardian ad litem must be accompanied by someone who could testify if necessary. This may be the social worker, a law enforcement officer, a foster parent, or another person who, in the guardian ad litem’s judgment, is appropriate to testify.

Consistent with the Family First Prevention Services Act, Pub. L. No. 115-123, §§ 50701–5072, 132 Stat. 64 (2018) (codified in part at 42 [U.S.C.](#) §§ 670–679c (Title IV-E of the Social Security Act)), Wisconsin enacted 2021 Wis. Act 42 and is redesigning the child welfare system and providing additional resources and funding for out-of-home-placement prevention efforts. In addition to this, the DCF is certifying QRTPs to ensure they support children and have a trauma-informed approach. The DCF also is working to support the child protective services workforce to be able to keep children in the home whenever possible. *See generally* DCF, *Qualified Residential Treatment Programs (QRTP)*, <https://dcf.wisconsin.gov/family-first/q RTP> (last visited Oct. 9, 2024).

IV. Children and Unborn Children in Need of Protection or Services [§ 4.8]

A. Jurisdiction [§ 4.9]

The court to which jurisdiction is assigned under [Wis. Stat.](#) ch. 48 has exclusive jurisdiction over CHIPS actions. [Wis. Stat.](#) § 48.13 establishes more than a dozen different grounds for obtaining jurisdiction, including both commonly used grounds (e.g., abuse and neglect) and grounds that are rarely applicable (e.g., illegal placement for adoption). [Wis. Stat.](#) § 48.133 provides that the juvenile court also has exclusive jurisdiction over cases in which an expectant mother habitually lacks self-control in the use of drugs or alcohol to the extent there is a substantial risk to the unborn child’s physical health, and that, when born, the child will be seriously affected.

A CHIPS or UCHIPS petition must specify the statutory basis under [Wis. Stat. § 48.13](#) or [48.133](#) for the court's jurisdiction. The petition that alleges that jurisdiction exists must therefore be carefully and accurately drafted. The petition must also contain information regarding protection or services, not already provided, that the court can order for the child. *State v. Courtney E. (In the Int. of Courtney E.)*, [184 Wis. 2d 592](#), 600, [516 N.W.2d 422](#) (1994).

The guardian ad litem should be familiar with [Wis. Stat. §§ 48.14](#) and [48.15](#) concerning the juvenile court's jurisdiction. If the juvenile court has taken jurisdiction under [Wis. Stat. § 48.13](#), [48.133](#), or [48.14](#), then under [Wis. Stat. § 48.15](#), the juvenile court takes precedence over any other court in which a child is involved, including any paternity or family court orders. [Wis. Stat. § 48.15](#) also provides that “nothing in [[Wis. Stat. ch. 48](#)] deprives another court of the right to determine the legal custody of a child by habeas corpus or to determine the legal custody or guardianship of a child if the legal custody or guardianship is incidental to the determination of an action pending in that court.” There are, however, exceptions to this rule. One exception provides that a petition for a full, limited, or temporary guardian of the person for a child must be stayed while actions are pending under [Wis. Stat. § 48.13](#), [48.133](#), or [48.14\(1\)–\(10\)](#) or (12) or [ch. 938](#). [Wis. Stat. §§ 48.15](#), [48.9795\(2\)\(b\)2](#). A court under [Wis. Stat. § 48.9795](#), however, may appoint an emergency guardian, even if a child has a proceeding pending under [Wis. Stat. § 48.13](#), [48.133](#), or [48.14\(1\)–\(10\)](#) or (12) or [ch. 938](#), if immediate appointment of a guardian is in the child's best interests. In addition, an exception to [Wis. Stat. § 48.15](#) applies for children falling under the exclusive jurisdiction of an Indian tribe subject to [Wis. Stat. § 48.208\(3\)](#). See also *infra* [§ 4.51](#). Further, unless a child is subject to WICWA, the jurisdiction of a court under [Wis. Stat. ch. 48](#) is paramount in all cases involving any child or unborn child alleged to be in need of protection or services under [Wis. Stat. § 48.13](#), [48.133](#), or [48.14](#). [Wis. Stat. § 48.15](#).

Note. A federal case challenged the constitutionality of the Wisconsin UCHIPS law. While the U.S. Court of Appeals for the Seventh Circuit dismissed the case for mootness (the plaintiff (the previously expectant mother) moved out of the state of Wisconsin), the district court had previously found the law void for vagueness. *Loertscher v. Anderson*, [893 F.3d 386](#) (7th Cir. 2018), *vacating* [259 F. Supp. 3d 902](#) (W.D. Wis. 2017). For a period in 2017, after the district court's initial ruling, counties could not file UCHIPS petitions. This is an issue to continue to monitor.

B. Venue [§ 4.10]

In CHIPS and UCHIPS cases, venue is in either the county where the child or the expectant mother of an unborn child resides or the county where the child or expectant mother is present at the time the petition is filed. [Wis. Stat. § 48.185\(1\)](#). A child's county of residence will in almost all cases be that of the child's parents. *State v. Corey J.G. (In the Int. of Corey J.G.)*, 215 Wis. 2d 394, [572 N.W.2d 845](#) (1998). See section [4.89](#), *infra*, for venue requirements for termination-of-parental-rights proceedings.

Note. Most counties in Wisconsin are signatories to the Wisconsin Inter-County Agreement on Venue, Jurisdiction, Placement and Funding Responsibility in CHIPS, JIPS, and Delinquency Cases, <https://wjcia.org/images/custom/documents/resources/intercounty.pdf> (last visited Sept. 24, 2024). See, e.g., *Dane County Juvenile Court Policy & Procedure Manual* § 1.X. (July 2012), <https://juvenilecourt.danecounty.gov/Resources/Policy-and-Procedure-Manual>.

Venue for proceedings for change of placement under [Wis. Stat. § 48.357](#), revision of dispositional orders under [Wis. Stat. § 48.363](#), or extension of orders under [Wis. Stat. § 48.365](#) is in the county where the dispositional order was issued, unless before the proceeding the court of that county determined that the proper venue for the proceeding lies in another county and transferred the case, along with all appropriate records, to that other county. [Wis. Stat. § 48.185\(4\)](#).

C. Taking a Child or Expectant Mother into Custody [§ 4.11]

A child in the community can be held in temporary physical custody by child protective services. This generally occurs when that child, or another child in the home, is suffering abuse or neglect by an individual in a caregiving role. Law enforcement can also take a child into custody under [Wis. Stat. § 48.19\(1\)\(d\)5](#). Specifically, if “[t]he child is suffering from illness or injury or is in immediate danger from his or her surroundings and removal from those surroundings is necessary.” Under such circumstances, the social worker or the law enforcement officer removes the child from the parental home and places the child in an emergency placement—for example, foster care or the home of a relative or like-kin.

Wisconsin has a safe-haven law under [Wis. Stat. § 48.195](#). Under this law, a newborn who is relinquished to hospital or law enforcement personnel within 72 hours after birth can be taken into custody and a CHIPS petition may be filed under [Wis. Stat.](#)

§ 48.13(2m). If a child is subject to this statute, the parent who relinquishes custody of the child, and any person who assists the parent, may leave the hospital, fire station, or law enforcement agency at any time, and no person may follow the parent or person who provided assistance. [Wis. Stat.](#) § 48.195(2)(b). This does not apply if the person has reasonable cause to believe the child has been the victim of abuse or neglect, or the person believes the person assisting the parent has coerced the parent into relinquishing custody of the child. [Wis. Stat.](#) § 48.195(2). The parent or person assisting the parent in the relinquishment of a child is immune from any civil or criminal liability for any good-faith act or omission in connection with the relinquishment of the child. [Wis. Stat.](#) § 48.195(4). This immunity also applies to conduct of hospital or law enforcement personnel solely in connection with the act of receiving custody, but there is no immunity for acts or omissions in subsequently providing care for the child.

A hearing for a child removed from the parental home, commonly called a “temporary physical custody hearing,” must be held within 48 hours after the decision to hold the child is made, excluding Saturdays, Sundays, and legal holidays. [Wis. Stat.](#) § 48.21(1)(a). This hearing must be conducted by a judge or a circuit court commissioner. The CHIPS or UCHIPS petition can be filed at this hearing, unless custody was taken pursuant to [Wis. Stat.](#) § 48.19(1)(b) or (d)2. or 7. or the child is a runaway from another state, in which case a written statement of reasons for holding the child in custody will be substituted if the petition is not filed. *Id.* If no hearing has been held within 48 hours, the child must be released. *Id.*

If no petition has been filed by the time of the temporary physical custody hearing, the child may be held in custody with the approval of a judge or circuit court commissioner for an additional 72 hours (excluding Saturday, Sunday, and holidays) from the time of the hearing. To extend custody under [Wis. Stat.](#) § 48.21(1), a judge or commissioner must determine that probable cause exists to believe any of the following: (1) additional time is required to determine whether a petition is necessary; (2) the child presents an imminent self-danger or an imminent danger to others, (3) the parent, guardian, legal custodian, or other responsible adult is neglecting, refusing, unwilling, or unavailable to provide adequate supervision and care; or (4) in a UCHIPS case involving a child expectant mother, there is a substantial risk that if she is not held, the physical health of the unborn child, and of the child when born, will be seriously affected or endangered by the child expectant mother’s severe and habitual use of alcohol or drugs combined with a rejection of treatment for alcohol or drug abuse. [Wis. Stat.](#) § 48.21(1)(b). This extension may be granted only once for any one petition. [Wis. Stat.](#) § 48.21(1)(bm).

Note. It is somewhat unusual for a guardian ad litem to be appointed before the emergency custody hearing. The guardian ad litem who has been appointed and is present at the hearing must make absolutely certain that, if the filing of a petition is appropriate, the petition is filed in a timely fashion. If a petition has not been filed by the time of the hearing, the guardian ad litem should ensure that the judge or circuit court commissioner makes the appropriate determination to be granted the 72-hour extension for filing the petition.

Before an emergency custody hearing in a CHIPS case, the intake worker must notify the parents of the hearing. [Wis. Stat.](#) § 48.21(3)(b). On the temporary physical custody form that should be completed by the individual taking a child into custody, there is a blank for the date and time of hearing for notice purposes. See Form [JC-1608](#) (or Form [IW-1608](#) for an Indian child). Whether the petition is ready for the temporary physical custody hearing, or the hearing within 72 hours after that, the intake worker must ensure the parent receives the petition. If the child is 12 years old or older, the child must also be given notice of the hearing and a copy of the petition. If the child is an expectant mother, the unborn child’s guardian ad litem must also receive notice of the hearing and a copy of the petition. [Wis. Stat.](#) § 48.21(3)(b).

Practice Tip. A guardian ad litem who represents a child 12 years old or older should consider seeking approval to either waive the child’s appearance or have the child appear by phone, depending on when the hearing is scheduled. This will allow a child to remain in school or to participate in other normal daily activities after what could have been a traumatic removal from the child’s home.

Under [Wis. Stat.](#) § 48.21(4), the judge or circuit court commissioner will determine whether the child should remain in custody under the criteria set out in [Wis. Stat.](#) § 48.205. These criteria include probable cause that, (1) if not held in custody, the child will be subject to self-injury or injury by others; (2) the child will be subject to injury by others based on injuries to another child in the home; (3) a parent or guardian is neglecting, refusing, unable, or unavailable to provide adequate care to ensure the child’s safety or the safety of another child in the home; (4) a child may run away or be made unavailable to participate in court proceeding; and (5) there is a substantial risk to an unborn child because of the expectant mother’s habitual lack of self-control in the use of alcohol and drugs. The guardian ad litem should be familiar with the criteria set forth in [Wis. Stat.](#) § 48.205 and should prepare for the hearing to ensure that the relevant facts are presented and that the arguments linking those facts to the [Wis. Stat.](#) § 48.205 criteria are made.

The order to hold the child in temporary physical custody must be in writing and must list the reasons and criteria for keeping the child in custody. [Wis. Stat. § 48.21\(5\)\(a\)](#). In addition, an order placing a child outside the child's home must also include all the following: (1) a finding that continued placement of the child in the child's home would be contrary to the welfare of the child and, unless specified circumstances apply, findings under [Wis. Stat. § 48.21\(5\)\(b\)1.](#) regarding reasonable efforts to prevent removal from the home and to make the child's safe return possible; (2) a statement that the court either approves of a placement recommended by the intake worker or has given bona fide consideration to the recommendation of the intake worker and all parties; (3) a determination that reasonable efforts to make it possible for the child to return safely home are not required, if any of the specified circumstances under [Wis. Stat. § 48.355\(2d\)\(b\)1.–5.](#) apply; and (4) if the child has siblings who were also removed from the parental home, a determination whether reasonable efforts were made to keep the children together or, if keeping the children together was contrary to their safety or well-being, whether reasonable efforts were made to permit the children to frequently visit each other. [Wis. Stat. § 48.21\(5\)\(b\)](#). The court must make additional findings for placement in a certified QRTP. [Wis. Stat. § 48.21\(5\)\(b\)2g](#).

If a parent is present at the hearing, the court must ask and could order the parent to provide the names of at least three relatives or other individuals whose homes could be possible placements for the child if the child is not returned home. [Wis. Stat. § 48.21\(3\)\(f\)](#). The agency can also be ordered to conduct a diligent search of possible relatives for placement. The agency would then be responsible for notifying these relatives, if believed to not be dangerous to the child, regarding possible placement. *See* [Wis. Stat. § 48.21\(5\)\(e\)2](#).

If appointed after the emergency custody hearing, the guardian ad litem may wish to request a rehearing under [Wis. Stat. § 48.21\(3\)\(e\)](#). A request for a rehearing may be based on newly discovered evidence or on the guardian ad litem's review of information available before the emergency custody hearing at which the guardian ad litem was not present, although no formal newly discovered evidence is required. If a rehearing is requested by the guardian ad litem or counsel representing another party who was not previously present, "a rehearing shall take place as soon as possible." *Id.* Additional considerations for children with special needs who have been removed from the home under an emergency custody order are discussed in section 4.56, *infra*. *See also* [Wis. Stat. §§ 48.20](#) (release of child from custody), [48.207](#) (nonsecure custody), [48.208](#) (custody in juvenile detention facility).

Note. Review under [Wis. Stat. § 48.21\(3\)\(e\)](#) is as of right when the child's interests were not represented at the original custody review hearing.

The court may place a child outside the home with the child's parent at a qualifying residential family-based treatment facility (QRFTF). [Wis. Stat. § 48.207\(1\)\(L\)](#); *see also* [Wis. Stat. § 48.13\(14\)](#) (ground for CHIPS jurisdiction). A QRFTF is a "certified residential family-based alcohol or drug abuse treatment facility" that meets the criteria in [Wis. Stat. § 48.02\(14m\)](#), such as providing "parent education" and an overall treatment framework with a "trauma-informed approach." For a QRFTF placement to occur, the child's permanency plan must recommend it and the parent must consent to it. [Wis. Stat. § 48.207\(1\)\(L\)](#).

Note. The guardian ad litem should expect a temporary out-of-home placement for the child until a QRFTF is located where the child can be placed with the parent.

If a child is already under a temporary physical custody order and needs to change placement, the notice-of-change-in-placement form is used. *See* Form [JD-1754](#); Form [IW-1754](#). The completed form should indicate that the change of placement is for a child under a temporary physical custody order. The guardian ad litem should ensure that each part of the form is completed, including information about the new placement (e.g., address) and why the child had to be moved. To request a hearing for information or to contest the change in placement, a person receiving notice of the change must file a written objection within 10 days after the filing of the notice. [Wis. Stat. § 48.217\(1\)\(c\)](#).

D. Filing of the Petition [§ 4.12]

To initiate a CHIPS or UCHIPS action, a petition must be filed with the court. The petition may be filed by the district attorney or corporation counsel if the petition is brought under [Wis. Stat. § 48.13](#) or [48.133](#), or by the counsel or guardian ad litem for a parent, relative, guardian, or child if the petition is brought under [Wis. Stat. § 48.13](#) or [48.14](#). [Wis. Stat. § 48.25\(1\)](#). The counsel or guardian ad litem for an expectant mother or the guardian ad litem for an unborn child may file a petition under [Wis. Stat. § 48.133](#). *Id.* Although frequently the petition is signed by the social services intake worker, it may be signed by anyone having knowledge of the circumstances giving rise to CHIPS or UCHIPS jurisdiction. [Wis. Stat. § 48.25\(1\)](#); *see also* [Wis. Stat. §§ 48.24](#), [48.243](#), [48.245](#), [48.25\(2\)](#), [48.21\(1\)](#).

Under the CHIPS ground in [Wis. Stat. § 48.13\(14\)](#), a parent who lives in a QRFTF can sign a petition requesting jurisdiction of the court. This is similar to the ground under [Wis. Stat. § 48.13\(4\)](#) (special treatment or care). *See infra* § [4.54](#).

E. Content of the Petition [§ 4.13]

A CHIPS petition must contain all of the following: (1) the child's name, age, and location, and whether the child has been adopted; (2) the names of the child's parent, guardian, legal custodian, or spouse, if any (or the name and address of the nearest relative); (3) information about whether the child is in custody, and if so, where (unless there is reasonable cause to believe that disclosure of the child's location would result in imminent danger to the child or physical custodian); (4) the information required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) under [Wis. Stat. § 822.29\(1\)](#); (5) whether the child may be subject to ICWA, 25 [U.S.C. §§ 1901–1963](#), and, if the child may be subject to that act, the names and addresses of the child's Indian custodian, if any, and Indian tribe, if known, *see infra* §§ [4.51](#), [4.109](#) (Indian Child Welfare Act); and (6) reliable and credible information supporting the allegations that form the basis for seeking the court's jurisdiction. [Wis. Stat. § 48.255\(1\)\(a\)–\(e\)](#). The petition must also contain information regarding protection or services, not already provided, that the court can order for the child. *State v. Courtney E. (In the Int. of Courtney E.)*, [184 Wis. 2d 592](#), 600, [516 N.W.2d 422](#) (1994).

A UCHIPS petition must contain all of the following: (1) the expectant mother's name, birth date, and address; (2) the unborn child's estimated gestational age; (3) the names and addresses of the parent, guardian, legal custodian, or spouse, if any, of the expectant mother if the expectant mother is a child (or the name and address of the nearest relative); (4) the name and address of the expectant mother's spouse, if any, if the expectant mother is an adult (or the name and address of the nearest relative); (5) whether the expectant mother is in custody, and if so, where she is being held and the time when she was taken into custody (unless there is reasonable cause to believe that disclosure of the expectant mother's location would result in imminent danger to the unborn child, expectant mother, or physical custodian); (6) whether the unborn child may be subject to ICWA, 25 [U.S.C. §§ 1901–1963](#), and, if the unborn child may be subject to that act, the name and address of the Indian tribe with which the unborn child may be eligible for affiliation when born, if known; and (7) reliable and credible information that forms the basis of the allegations. [Wis. Stat. § 48.255\(1m\)\(a\)–\(e\)](#).

If the child in a CHIPS case has been removed from the parental home, the petition must set forth reliable and credible information showing that (1) continued placement of the child in the parental home would be contrary to the child's welfare; and, unless specified circumstances apply, (2) the person who took the child into custody and the intake worker have made reasonable efforts to prevent the child's removal from the home, while ensuring the child's health and safety, and to make it possible for the child to return safely home. [Wis. Stat. § 48.255\(1\)\(f\)](#). The petition must state similar information if a child expectant mother has been removed from her home in a UCHIPS case. [Wis. Stat. § 48.255\(1m\)\(f\)](#).

If the petitioner in a CHIPS case knows or has reason to know that the child is an Indian child, and if the child has been removed from the home, the petition must also set forth reliable and credible information showing that (1) continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and (2) active efforts have been made to prevent the breakup of the Indian child's family and those efforts have proved unsuccessful. [Wis. Stat. § 48.255\(1\)\(g\)](#). A UCHIPS petition must state similar information if the petitioner knows or has reason to know that the expectant mother is an Indian child and the child expectant mother has been removed from the home of her parent or Indian custodian. [Wis. Stat. § 48.255\(1m\)\(g\)](#).

The CHIPS or UCHIPS petition may be amended in three circumstances: (1) when an error has been made, the court may order an amendment to cure the defect, [Wis. Stat. § 48.263\(1\)](#); (2) when any person wishes to amend the petition before a plea has been entered, the court may allow an amendment if there is reasonable notification to all interested parties, [Wis. Stat. § 48.263\(2\)](#); and (3) when any person wishes to amend the petition after a plea has been entered, the court may allow an amendment if any objecting party is allowed a reasonable continuance. *Id.*

F. Notice and Service [§ 4.14]

After a CHIPS or UCHIPS petition has been filed, the court may issue a summons requiring the person with legal custody of the child or child expectant mother to appear before the court, [Wis. Stat. § 48.27\(1\)\(a\)](#), or requiring the adult expectant mother to appear before the court. [Wis. Stat. § 48.27\(1\)\(b\)](#). The court may also issue a summons requiring the appearance of any other person whose presence is necessary for the proceedings. [Wis. Stat. § 48.27\(2\)](#). In addition, the court must notify the child, parent, guardian and legal custodian, foster parent or other physical custodian, the unborn child's guardian ad litem, and any other interested person of all

hearings involving the child. [Wis. Stat.](#) § 48.27(3). (Additional persons entitled to notice include a person who has filed a declaration of paternal interest or a person who may otherwise be the father of the child, *see* [Wis. Stat.](#) § 48.27(3)(b); the parent or Indian custodian of an Indian child who has been removed from the home or an unborn child who may be an Indian child when born, *see* [Wis. Stat.](#) § 48.27(3)(d); and the child's court-appointed special advocate, *see* [Wis. Stat.](#) § 48.27(3)(e).) A *capias* may be issued to any person summoned who, without reasonable cause, fails to appear. [Wis. Stat.](#) § 48.28. Because delay generally is detrimental to the child, the guardian ad litem should be assertive in ensuring that parents appear at all scheduled hearings. In some cases, the guardian ad litem must request the issuance of a *capias*. In other cases, it might be appropriate for the missing parent to participate in a hearing by telephone conference. The parent's attorney should be present in the courtroom or chambers, and the parent must agree, on the record, to such participation. In this manner, a case that is not moving along because a parent lacks transportation or the motivation to appear may be able to proceed to the next stage.

Note. When parents have the same residence, notice to one constitutes notice to both. Also notice of the first hearing to any interested party, foster home, or other physical custodian must be in writing. All subsequent hearing notices may be given telephonically at least 72 hours in advance, and that notice must be documented by the individual providing notice. [Wis. Stat.](#) § 48.27(3)(a)1.

The guardian ad litem must be familiar with the notice and jurisdictional requirements of the UCCJEA, [Wis. Stat.](#) ch. 822. The UCCJEA explicitly applies in TPR cases. [Wis. Stat.](#) § 822.02(4) (including "termination of parental rights" in definition of *child custody proceeding*); *see also* *Brus C. v. Shawn D. (In re Termination of Parental Rts. of Steven C.)*, [169 Wis. 2d 727](#), 733, [486 N.W.2d 572](#) (Ct. App. 1992) (holding that Uniform Child Custody Jurisdiction Act (UCCJA) applied to TPR proceeding). The UCCJEA also applies to proceedings for "neglect" or "dependency," which, under the UCCJA (the precursor to the UCCJEA), the court of appeals has interpreted to include CHIPS cases. *N.J.W. v. State (In the Int. of J.T.)*, [168 Wis. 2d 646](#), 652, [485 N.W.2d 70](#) (Ct. App. 1992). Although the supreme court has ruled that there must be compliance with the notice requirements of the UCCJA in every case, the court also concluded that the jurisdictional requirements of the UCCJA applied only in interstate cases. *David S. v. Laura S. (In the Int. of Brandon S.S.)*, [179 Wis. 2d 114](#), 136–43, [507 N.W.2d 94](#) (1993). This holding should also apply under the UCCJEA, which retains the overall interstate focus of the former UCCJA. *See generally* [Wis. Stat.](#) § 822.01(2) (describing cooperation with "other states" among purposes of UCCJEA).

Practice Tip. [Wis. Stat.](#) § 48.255(1)(cg) states that a CHIPS petition must contain the information required under [Wis. Stat.](#) § 822.29(1), which includes the information listed on the Wisconsin state form for the UCCJEA affidavit, Form [GF-150](#).

G. Preadjudication [§ 4.15]

1. Right to Counsel [§ 4.16]

Children are generally afforded the right to legal representation in CHIPS cases. Under [Wis. Stat.](#) § 48.23(1m)(b)1., a child may be represented by counsel at the discretion of the court, although a child 15 years of age or older may waive counsel if the court is satisfied that such waiver is knowing and voluntary. A child under the age of 12 may be represented by a guardian ad litem instead of advocacy counsel. [Wis. Stat.](#) § 48.23(1m)(b)2. If the petition is contested, the court cannot place the child outside the child's home if not represented by counsel (or by a guardian ad litem if the child is under 12 years of age) at the fact-finding hearing and subsequent proceedings. *Id.* Further, if a petition is not contested, a child cannot be placed outside the parental home unless the child is represented by advocacy counsel, or by a guardian ad litem if the child is under 12 years of age. *Id.*

If a CHIPS proceeding involves the removal of an Indian child from the home of the Indian child's parent or Indian custodian or placement in an out-of-home care placement, the child's parent or Indian custodian has the right to counsel. [Wis. Stat.](#) § 48.23(2g).

In other CHIPS proceedings, parents, whether minors or adults, did not have a right to counsel until legislation enacted in 2018. *See* [Wis. Stat.](#) § 48.23(2), (3) (2015–16); 2017 Wis. Act 253. The Wisconsin Supreme Court had held that the language of [Wis. Stat.](#) § 48.23(3), *as amended* by 1995 Wis. Act 27, that prohibited a court from appointing counsel for anyone other than the child in a CHIPS proceeding was unconstitutional. *Joni B. v. State*, [202 Wis. 2d 1](#), [549 N.W.2d 411](#) (1996). The legislature removed this prohibition through the enactment of 2017 Wis. Act 253.

Note. 2017 Wis. Act 253 also created a pilot program in five Wisconsin counties for the state public defender's office to provide counsel to any nonpetitioning parent after a petition has been filed in a proceeding under [Wis. Stat.](#) § 48.13. The program created

under this legislation will remain in effect until June 30, 2025. [Wis. Stat.](#) § 48.233.

Comment. It is unclear whether a petitioning parent has a right to counsel in counties participating in the pilot program with the Office of the State Public Defender as created in 2017 Wis. Act 253. This act allows for a nonpetitioning parent to seek representation in proceedings under [Wis. Stat.](#) § 48.13 if the county is part of the program. Therefore, because a parent signs the petition and requests jurisdiction under [Wis. Stat.](#) § 48.13(4), for example, that parent would not formally qualify for representation as part of the pilot program. In practice, however, there has been no distinction between petitioning and nonpetitioning parents in appointment of counsel by the Office of the State Public Defender.

In general, even before the amendment to [Wis. Stat.](#) § 48.23(3) by 2017 Wis. Act 253, many courts invoked their inherent authority to appoint counsel for indigent parents in appropriate cases. From the beginning of any hearing in children's court, it is important for the guardian ad litem to ensure that a complete record is made as soon as a parent requests an attorney until the court determines whether to appoint counsel. The Wisconsin Supreme Court has determined that the court can consider the following factors when appointing counsel:

- The parent's individual characteristics, including age, mental capacity, education, and prior court contact;
- The parent's level of interest in the proceedings and desire to participate;
- Whether the petition alleges incidents of abuse or neglect that could lead to criminal prosecution;
- The complexity of the case, including the possibility of the introduction of medical or psychological evidence; and
- The probability of out-of-home placement and potential duration of separation.

Joni B., 202 Wis. 2d at 19. The court need not discuss these factors for the appointment of counsel unless a parent requests an attorney or there is reason to believe one should be appointed. *See id.* Nevertheless, if a guardian ad litem reasonably believes counsel is needed for a parent and does not notify the court of this potential issue, a case could face challenges in the future that will delay permanency for the child.

If the child's parent is under 18 years of age and has a right to be represented by counsel or is provided counsel by the court, and counsel is not waived, the court must refer the minor parent to the state public defender and counsel must be appointed without a determination of indigency. [Wis. Stat.](#) § 48.23(4)(a). A party always has the option of hiring an attorney at that party's own expense as well. [Wis. Stat.](#) § 48.23(4)(a). A party always has the option of hiring an attorney at that party's own expense as well.

In a UCHIPS action, a child expectant mother is entitled to counsel and cannot waive counsel. [Wis. Stat.](#) § 48.23(2m)(a). If the petition is contested, no expectant mother may be placed outside her home unless she is represented by counsel at the fact-finding hearing and subsequent proceedings. [Wis. Stat.](#) § 48.23(2m)(b). If the petition is not contested, the child expectant mother cannot be placed outside her home unless she is represented by counsel at the hearing at which the placement is made. *Id.* An adult expectant mother, however, may waive counsel if the court is satisfied that the waiver is knowingly and voluntarily made. *Id.* An expectant mother under age 12 may be represented by a guardian ad litem instead of counsel. [Wis. Stat.](#) § 48.23(2m)(c).

When a minor petitions the court for a waiver of the requirement of parental consent for an abortion, the court, in its discretion, may appoint a guardian ad litem for the minor. [Wis. Stat.](#) § 48.375(7)(am). The guardian ad litem should be aware of the exceptions to the parental consent requirement, which include the following: (1) medical emergency; (2) pregnancy as the result of a sexual assault in violation of [Wis. Stat.](#) § 940.225(1), (2), or (3), in which the minor did not freely agree to sexual intercourse; (3) the likelihood that the minor will commit suicide, as stated in writing by a physician specializing in psychiatry or a psychologist; (4) pregnancy as the result of sexual intercourse with a caregiver as described in [Wis. Stat.](#) § 48.981(1)(am)1., 2., 3., 4., or 8.; or (5) the fact that the minor has been the victim of abuse by an individual listed in [Wis. Stat.](#) § 48.375(4)(b)1. *See* [Wis. Stat.](#) § 48.375(4)(b).

The court's power to appoint guardians ad litem is absolute under [Wis. Stat.](#) § 48.235(1)(a). The court may appoint counsel or a guardian ad litem under conditions specifically set forth in the statutes and "in any appropriate matter." [Wis. Stat.](#) § 48.235(1)(a). The specific rules for the appointment of a guardian ad litem are set forth in [Wis. Stat.](#) § 48.235. In some cases, both advocacy counsel and a guardian ad litem are appointed. For example, in a proceeding proposing a specialized out-of-home placement for a child who is 16 and has cognitive delays, the child could have adversary counsel arguing against the placement (per the child's wishes) but have a guardian ad litem indicating that the placement is in the child's best interest.

2. Substitution of Judge [§ 4.17]

The requirements for substitution of judge in CHIPS and UCHIPS proceedings are set forth in [Wis. Stat. § 48.29](#). Any party, counsel for the party, or the guardian ad litem may file a written request with the clerk of court, either before or during the plea hearing, for a substitution of the judge assigned to the case. [Wis. Stat. § 48.29\(1\)](#). Only one such written request for a substitution of judge may be filed by the same party in any proceeding. *Id.* No substitution is permitted in custody review hearings under [Wis. Stat. § 48.21](#) or [48.213](#). *Id.* A minor petitioning for waiver of the parental consent requirement for abortion may select the judge of her choice to hear the petition. [Wis. Stat. § 48.29\(3\)](#).

Note. The court has held that under [Wis. Stat. § 48.29\(1\)](#) more than one party may file a request for a substitution of judge in a TPR hearing. *State ex rel. Julie A.B. v. Circuit Court (In re Termination of Parental Rts. to Prestin T.B.)*, [2002 WI App 220](#), ¶ 18, [257 Wis. 2d 285](#), [650 N.W.2d 920](#). While this case was specific to a TPR proceeding, the same statute is used as authority for substitution of judge in a CHIPS matter.

3. Physical, Psychological, Mental, or Developmental Examination [§ 4.18]

Under [Wis. Stat. § 48.295\(1\)](#), after the filing of the CHIPS petition and upon a court finding that reasonable cause exists to warrant an examination, the court may order any child coming within its jurisdiction to be examined by experts set forth in the statute. The court may also order an examination of a parent, guardian, or legal custodian whose ability to care for a child is at issue or, in a UCHIPS case, of an expectant mother whose inability to control her use of alcohol or drugs is at issue. [Wis. Stat. § 48.295\(1\)](#). Such examinations are paid for by the county. *Id.* The guardian ad litem should use these provisions only after carefully assessing the circumstances of the case. To conserve the parties' and the county's resources, children and parents should be examined only in appropriate situations. When it is important, however, for additional information to be obtained about the child's or the parents' physical, psychological, mental, or developmental condition, the guardian ad litem should request that the court order an examination. If practicable, and if permitted in the county, the guardian ad litem should also request that the examination be conducted by a specific expert who is experienced in the area of concern, including familial relations, parenting capacity, and trauma-based therapies. This expert should also be knowledgeable about juvenile court proceedings and able to serve as a competent witness if required to testify.

4. Discovery and Pretrial Motions [§ 4.19]

The requirements for discovery and pretrial motions in [Wis. Stat. ch. 48](#) proceedings are set forth in [Wis. Stat. §§ 48.293](#) and [48.297](#). All law enforcement reports "shall" be made available to the guardian ad litem when requested. [Wis. Stat. § 48.293\(1\)](#). Additionally, all records relating to a child or to an unborn child and the unborn child's expectant mother that are relevant to the subject matter of a proceeding under the Children's Code—with the exception of a guardianship proceeding under [Wis. Stat. § 48.9795](#)—are to be open to inspection by the guardian ad litem, upon demand and upon presentation of releases when necessary, at least 48 hours before any proceeding. [Wis. Stat. § 48.293\(2\)](#). Additionally, the guardian ad litem may obtain copies of the records with the custodian's or the court's permission. *Id.* The guardian ad litem should be careful not to disclose the contents of these documents, except with the court's permission, to anyone other than the professionals directly involved in the proceedings. *See supra* [§ 4.7](#).

Note. Audiovisual recordings of oral statements of children under [Wis. Stat. § 908.08](#) must be made available to the guardian ad litem upon request before the fact-finding hearing. [Wis. Stat. § 48.293\(3\)](#). A guardian ad litem should also be familiar with [Wis. Stat. § 908.08](#), which governs the use of these forensic interviews in fact-finding hearings.

Practice Tip. It is incumbent on the guardian ad litem to ensure that the court marks the box on circuit court Form [JD-1798A](#), order appointing guardian ad litem, ordering that the guardian ad litem "shall" have access to all records in possession of juvenile intake, the county or state department, child welfare agencies, schools, or law enforcement agencies pertaining to the case, regardless of the originating source, including medical, mental health, psychological, counseling, and drug or alcohol records from a nonfederally assisted program, as defined in 42 [C.F.R.](#) pt. 2; and financial, educational, employment, probation, and law enforcement records.

In addition, full civil discovery is available in [Wis. Stat. ch. 48](#) proceedings. [Wis. Stat. § 48.293\(4\)](#). Because most of the [Wis. Stat. ch. 804](#) discovery provisions provide for a response time of 30 days or more, it is frequently necessary to request an order shortening the time for the respondent to comply, as permitted in [Wis. Stat. ch. 804](#).

The rules and time periods for the filing of specific pretrial motions are set forth in [Wis. Stat.](#) § 48.297. A familiarity with this statute's provisions is important not only when filing these motions but also when objecting to defense counsel's filing of motions, especially if that filing has not been timely. Under [Wis. Stat.](#) § 48.297(5), if the child or the expectant mother of an unborn child is in custody and the court grants a motion to dismiss based on a defect in the petition, the court may order the child or the expectant mother of an unborn child to remain in custody for up to 48 hours pending the filing of a new petition.

5. Delays, Continuances, and Extensions [§ 4.20]

The legislative purpose of [Wis. Stat.](#) ch. 48 is not only to reunify children with their parents while ensuring the children's health and safety but also to promote providing children another form of permanency at the earliest possible time after reunification efforts are discontinued. *See* [Wis. Stat.](#) § 48.01. Delay is probably the greatest detriment to achieving these goals in juvenile court. Therefore, the guardian ad litem must be intimately familiar with the statutory provisions and must avoid delay unless it is absolutely necessary.

In general, [Wis. Stat.](#) ch. 48 establishes deadlines for the completion of the different stages of the proceedings by limiting the number of days between each stage (e.g., from the filing of the petition to the plea hearing—30 days for a child in nonsecure custody, 10 days for a child in secure custody, *see* [Wis. Stat.](#) § 48.30(1); from the plea hearing to the fact-finding trial—30 days for a child in nonsecure custody, 20 days for a child in secure custody, *see* [Wis. Stat.](#) § 48.30(7); and from the trial to disposition—30 days for a child in nonsecure custody, 10 days for a child in secure custody, *see* [Wis. Stat.](#) § 48.31(7)). [Wis. Stat.](#) § 48.315(3) establishes the potential consequences of failing to act within a designated time period or of failing to object to a continuance or a time-period violation:

1. Failure to object to a violation of a time period or to a continuance is a waiver of any challenge to the court's competency to act during a period of delay or continuance. [Wis. Stat.](#) § 48.315(3).

Note. This suggests that parties can waive time periods in [Wis. Stat.](#) ch. 48. If a party waives an objection by remaining silent, an affirmative waiver seems no less possible.

2. If the court or a party fails to act within a time period, and a party objects to the delay, the circuit court, while ensuring the child's safety, *may* grant a continuance, dismiss the case without prejudice, release the child from custody, or grant any other appropriate relief. *Id.*

Comment. A continuance will simply add more time to a case without a full court order. If there is an out-of-home placement, permanency time frames begin to apply as soon as a child is placed outside the home, even if under only a temporary order. A dismissal without prejudice permits the petitioner to refile the action but is likely to create timeliness issues anew (because a CHIPS petition filed by an agency must be filed within 60 days after the receipt of referral information by the agency, [Wis. Stat.](#) § 48.24(5)). Thus, the listed examples of possible remedies in [Wis. Stat.](#) § 48.315(3) may provide no appropriate remedies, leaving to the court's discretion the task of finding "any other relief that the court considers appropriate." [Wis. Stat.](#) § 48.315(3).

[Wis. Stat.](#) § 48.315 establishes two different methods of increasing the time between the stages of a proceeding under the Children's Code. [Wis. Stat.](#) § 48.315(1) sets forth various time periods that are *excluded* in computing the time requirements. For the most part, these exclusions are self-executing; the court does not have to do anything to gain the extra time. For example, if the first judge assigned to a case is disqualified, and it takes 11 days for the new judge to be assigned, the 11 days are not counted in determining whether the next required hearing is timely.

In contrast, [Wis. Stat.](#) § 48.315(2) permits a judge to grant a continuance for reasons other than those specified in [Wis. Stat.](#) § 48.315(1). *State v. Robert K. (In re Termination of Parental Rts. to Moriah K.)*, [2005 WI 152](#), ¶ 4, 286 Wis. 2d 143, [706 N.W.2d 257](#). Such a continuance must be granted on the record (in court or by telephone), must be only for as long as is necessary, and must be based on good cause. One example of good cause is congestion in a court's calendar, although there may be limits to how long a delay for this reason can be granted and remain reasonable. *See id.* ¶ 54.

Practice Tip. Circuit courts are known to make mistakes when scheduling hearings. It is all too easy for a court clerk to suggest several different court dates, all timely, only to learn that one attorney or party has a conflict. By the time a date is found that is acceptable for all participants, the date is outside the permitted time period. These discussions often occur at the end of the hearing, with another case waiting in the wings and the judge hoping to move along. The judge might not recognize that the date

selected has now fallen beyond the time periods of [Wis. Stat.](#) ch. 48 or may overlook the need to find good cause. It is necessary that the guardian ad litem ensure the correct record is made.

Practice Tip. A guardian ad litem must differentiate between exclusions and continuances. There are often areas of uncertainty. Take the example above of an 11-day delay between the disqualification of a judge and the appointment of a new judge. It is clear that [Wis. Stat.](#) § 48.315(1)(c) excludes the 11 days in the calculation of the time period. But what if the newly assigned judge takes 5 days to send out notice of the next hearing, and the time between the notice and the next hearing is 5 additional days? Are these days also excluded as “caused by the disqualification of the judge” pursuant to [Wis. Stat.](#) § 48.315(1)(c)? In an unpublished decision, the court of appeals addressed this issue: “We further conclude that, because [the judge] promptly convened a hearing on the petitions within five days of her assignment to the cases, these five days may also be attributed to the change in judges.” *Dane Cnty. Dep’t of Hum. Servs. v. Todd S. (In re Termination of Parental Rts. to Sophia S.)*, Nos. [2005AP3078](#), [2005AP3079](#), [2005AP3080](#), [2005AP3081](#), 2006 WL 1277092, ¶ 8 (Wis. Ct. App. May 11, 2006) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). Of course, this leaves open the potential for litigation on how prompt is prompt enough. To avoid these potential pitfalls, it is strongly recommended that the court be requested to grant a continuance that covers these situations. For example, if the delay is occasioned by a psychological evaluation (the time for which is expressly excluded under [Wis. Stat.](#) § 48.315(1)(a)), it is clear that if 35 days, for example, elapse between the referral to the psychologist and the issuance of the report, those 35 days are excluded. If, however, after receiving the report, the court sends out notice for a hearing on a date 15 days later, those 15 days may or may not be excluded. Thus, the court should be requested to find good cause to continue the matter for a period of time following the issuance of the report that is sufficient to permit the scheduling of the next hearing.

If a request to extend the dispositional order is made and the court is unable to hold a hearing on the petition to extend the order before the order ends, the court may temporarily extend the order for up to 30 days without a hearing. [Wis. Stat.](#) § 48.365(6). This includes an extension for a child in either an in-home or an out-of-home placement if the agency determines that the extension is in the child’s best interest. See [Wis. Stat.](#) § 48.365.

Moving the case along quickly is especially important when the permanency plan for the child may include involuntary TPR. The guardian ad litem should develop a good relationship with the clerk or other person who schedules hearings and, to keep the case moving, should make a personal request, if necessary, for the scheduling of proceedings. For information on the importance of speed in terms of child development and of a child’s perception of time, see [chapter 2](#), *supra*.

6. Consent Decree [§ 4.21]

At any time after the filing of the petition and before the entry of judgment, the judge or circuit court commissioner may suspend the CHIPS or UCHIPS proceedings and allow the parties to enter into a consent decree. [Wis. Stat.](#) § 48.32. This can be an in-home or an out-of-home placement or a case subject to WICWA. The consent decree must establish terms and conditions applicable to the parent, guardian, or legal custodian, the child, the child expectant mother and her parent, guardian, or legal custodian, or the adult expectant mother. [Wis. Stat.](#) § 48.32(1). A guardian ad litem appointment must be made or extended for a child’s placement outside the child’s home. [Wis. Stat.](#) § 48.235(1)(e). The child, if 12 years of age or older, the child expectant mother and her parent, guardian, or legal custodian, the adult expectant mother, the unborn child’s guardian ad litem, and the person who has filed the petition must agree to the consent decree. *Id.* The consent decree may remain in effect up to six months unless dismissed earlier by the judge or circuit court commissioner. [Wis. Stat.](#) § 48.32(2)(a). The court may extend the decree for up to an additional six months in the absence of objection by the parties or after a hearing if the evidence so warrants. [Wis. Stat.](#) § 48.32(2)(c). If, during the time the consent decree is in effect, the court finds that the child, parent, legal guardian, legal custodian, or expectant mother has failed to fulfill the terms and conditions of the consent decree, the hearing under which the child or expectant mother was placed on supervision may be continued to conclusion as if the consent decree had never been entered. [Wis. Stat.](#) § 48.32(3). The hearing may also be continued to its conclusion if the child or expectant mother objects to the continuance of the consent decree. *Id.*

Placement in a certified QRTP is an option available under a consent decree. The qualified individual conducting the standardized assessment, the information included in the assessment, and the court’s findings are the same as for a placement in a QRTP under a temporary physical custody request and order. See [Wis. Stat.](#) § 48.32(1)(ar), (b)1r.

The assessment must be filed and given to all parties to the consent decree when the consent decree is entered or no later than 30 days after the date that placement is made. [Wis. Stat.](#) § 48.32(1)(ar). If the assessment is available when the consent decree is entered, then the court must make the findings required for a QRTP placement. If the assessment is not available when the consent

decree is ordered, the court must issue an order containing the factors for QRTP placement within 60 days after the date the placement was made. [Wis. Stat. § 48.32\(1\)\(cd\)](#). Again, the answers to the required findings do not affect whether the placement may be made. [Wis. Stat. § 48.32\(1\)\(b\)1r](#).

Relevant standard Wisconsin Circuit Court forms are available to help ensure that the parties stipulating to the consent decree submit (or arrange for submission of) the standardized assessment and that the court ordering the consent decree will make the required findings for a QRTP placement. See Form [JD-1785A](#); Form [JD-1785B](#); Form [IW-1785A](#); Form [IW-1785B](#).

Practice Tip. A consent decree may be useful in cases in which the factual basis of the petition is weak or when it appears that a one-time incident has occurred and that the child and the child's family would benefit from the establishment of terms and conditions that do not jeopardize the child's safety or well-being. The terms and conditions would likely mirror those in the dispositional order if done. It is permissible for a consent decree to be entered into *after* pleas of admissions are accepted, which is a useful plea-bargaining tool that avoids trial if the consent decree is revoked.

The parties to a consent decree may agree to, and the judge or circuit court commissioner may enter, an amended consent decree. [Wis. Stat. § 48.32\(1\)\(am\)](#). Using the procedures in [Wis. Stat. § 48.32\(1\)\(a\)](#) for entry of an original consent decree, an amended consent decree may change the placement of the child or expectant mother who is the subject of the original consent decree or revise any other term or condition of the original consent decree. An amended consent decree that changes the placement of a child from a placement in the child's home to a placement outside the child's home must include the findings, orders, and determinations specified in [Wis. Stat. § 48.32\(1\)\(b\)](#), as applicable.

Caution. An amended consent decree cannot extend the expiration date of the original consent decree. [Wis. Stat. § 48.32\(1\)\(am\)](#).

An amended consent decree that changes the placement of an Indian child from a placement in the Indian child's home to a placement outside the Indian child's home must include the findings specified in [Wis. Stat. § 48.32\(1\)\(d\)](#), supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and active efforts have been made to prevent the breakup of the Indian family but were unsuccessful. There also must be a finding that the placement of the child has been made according to the placement preferences under [Wis. Stat. § 48.028\(7\)](#) or that the court determines there is good cause to depart from the order-of-placement preferences in WICWA. [Wis. Stat. § 48.32\(1\)\(d\)](#).

H. Plea Hearing [§ 4.22]

Caution. [Wis. Stat. § 48.299\(9\)](#) provides that different time periods apply in cases in which the court determines or has reason to know that the child who is the subject of the proceeding is an Indian child. Also in such cases, Indian custodians are entitled to notice of their rights under [Wis. Stat. § 48.30\(2\)](#).

Within 30 days after the petition is filed, the plea hearing to determine whether any party wishes to contest an allegation that the child or unborn child is in need of protection or services must be held. [Wis. Stat. § 48.30\(1\)](#). If the child is being held in secure custody, the plea hearing must be held within 10 days after the petition is filed. *Id.* The plea hearing is conducted consistent with the provisions of [Wis. Stat. §§ 48.299–30](#). The court may permit any party to participate in the plea hearing by telephone or by live audiovisual means. [Wis. Stat. § 48.30\(10\)](#).

The court must make specific findings before restraints can be used on a child during a children's court proceeding. [Wis. Stat. § 48.299\(2m\)](#). The statute defines *restraint* as "leather, canvas, rubber, Velcro, or plastic restraints; handcuffs, waist belts, or leg chains; a wheel chair; an electric immobilization device; or any other device used to securely limit the movement of a child's body." [Wis. Stat. § 48.299\(2m\)\(a\)](#).

To order the use of restraints, the court must find that the restraints are necessary and there are no less restrictive alternatives that will prevent flight or physical harm to the child or another person. The less restrictive alternative may include the presence of court personnel, law enforcement officers, or bailiffs. A finding that the use of restraints is necessary must be based on at least one of the following factors:

1. Restraints are necessary to prevent physical harm to the child or another person.

2. The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations, or the child presents a substantial risk of inflicting physical self-harm or physical harm on others as evidenced by recent behavior.
3. There is a founded belief that the child presents a substantial risk of flight from the courtroom.

[Wis. Stat.](#) § 48.299(2m)(b).

Understanding these factors is extremely important to a guardian ad litem, who represents the best interest of the child, to help ensure that a child is not subject, without proper court review and findings, to the harm or emotional distress that restraints can cause.

At the commencement of the plea hearing, the court must advise the following interested parties of the rights specified in [Wis. Stat.](#) § 48.243 and inform them that a request for a jury trial or for a substitution of judge or for both must be made before the conclusion of the plea hearing or is waived: “the child and the parent, guardian, legal custodian, or Indian custodian; the child expectant mother, her parent, guardian, legal custodian, or Indian custodian, and the unborn child’s guardian ad litem; or the adult expectant mother and the unborn child’s guardian ad litem.” [Wis. Stat.](#) § 48.30(2).

Note. Nonpetitioning parties, including the child, “shall be granted a continuance of the plea hearing if they wish to consult with an attorney on the request for a jury trial or substitution of ... judge.” *Id.*

At the plea hearing, the nonpetitioning parties and the child, if the child is 12 years of age or older or is otherwise competent to do so, must state whether they desire to contest the petition. [Wis. Stat.](#) § 48.30(3). In a UCHIPS action involving an adult expectant mother, the expectant mother must state whether she wishes to contest the petition. *Id.* The guardian ad litem must enter a plea on the child’s or unborn child’s behalf.

If the petition is contested, the court will set a date for the fact-finding hearing. [Wis. Stat.](#) § 48.30(7). The date should allow reasonable time for the parties to prepare but may be no more than 20 days after the plea hearing for a child who is held in secure custody, and no more than 30 days after the plea hearing for a child or expectant mother of an unborn child who is not held in secure custody. *Id.* If the petition is not contested, the court will set a date for the dispositional hearing. The date should allow reasonable time for the parties to prepare but may be no more than 10 days after the plea hearing for a child who is held in secure custody and no more than 30 days after the plea hearing for a child or expectant mother of an unborn child who is not held in secure custody. [Wis. Stat.](#) § 48.30(6). If the parties consent, the court may proceed immediately with the dispositional hearing if a disposition report has been completed by the agency, filed with the court, and distributed to parties. *See* [Wis. Stat.](#) § 48.33. This report provides the court and all parties the necessary information for the court to make findings under [Wis. Stat.](#) § 48.335 and to reduce those findings to writing under [Wis. Stat.](#) § 48.355.

Caution. If the court or a party fails to act within the time periods under [Wis. Stat.](#) ch. 48, the court may dismiss the action, albeit without prejudice. Therefore, the guardian ad litem should ensure that the casework is performed within the applicable statutory time periods. Continuances are available under [Wis. Stat.](#) § 48.315 only if the court finds, on the record, good cause for granting the continuance. *See supra* § [4.20](#).

If the petition is not contested and the parties admit the allegations or enter a no-contest plea, the court must personally address the parties present, including the child or expectant mother, and determine that the plea or admission is made voluntarily with an understanding of the nature of the acts alleged in the petition and the potential dispositions. [Wis. Stat.](#) § 48.30(8)(a). The court must also establish whether any promises or threats were made to elicit a plea and must alert unrepresented parties to the possibility that an attorney might discover defenses or mitigating circumstances that may otherwise not be apparent. [Wis. Stat.](#) § 48.30(8)(b). Finally, the court must make such inquiries as satisfactorily establish a factual basis for the admissions. [Wis. Stat.](#) § 48.30(8)(c).

If the petition is not contested, the guardian ad litem should make certain that, if the child was removed from the parental home, the allegations in the petition clearly establish the conditions that led to the child’s removal. The importance of this responsibility in TPR cases is discussed in detail in sections [4.28](#) and [4.104](#), *infra*.

Practice Tip. The guardian ad litem should work with the prosecutor and parties to negotiate a settlement. The guardian ad litem should question which conditions the agency recommends for the parents under a dispositional order and which services need to

be in place or completed for reunification to occur.

At the plea hearing, the guardian ad litem should have an idea of how each party plans on proceeding. This is an opportune time to request that the court order evaluations if the particular case seems to warrant them, *see* [Wis. Stat. § 48.295](#), to agree to a consent decree, *see* [Wis. Stat. § 48.32](#), or amend the petition, *see* [Wis. Stat. § 48.263](#).

I. Fact-Finding Hearing [§ 4.23]

The purpose of the fact-finding hearing in a CHIPS or UCHIPS case is to determine whether the allegations in the petition are proved by clear and convincing evidence. [Wis. Stat. § 48.31\(1\)](#). Such proof grants the court jurisdiction under [Wis. Stat. § 48.13](#) or [48.133](#). The hearing is to the court unless a jury (six persons in CHIPS and UCHIPS cases, 12 persons in TPR cases) has been requested before or during the plea hearing. [Wis. Stat. § 48.31\(2\)](#). The fact-finding hearing must be held within 30 days after the plea hearing if the child or the expectant mother of an unborn child is not in secure custody or within 20 days after the plea hearing if the child is in secure custody, unless the provisions of [Wis. Stat. § 48.315](#) apply. [Wis. Stat. § 48.30\(7\)](#); *see supra* § 4.20 (delays, continuances, and extensions). *But see* [Wis. Stat. § 48.299\(9\)](#) (time periods for Indian children); *see also supra* § 4.22. Summary judgment procedures are available in CHIPS cases. *N.Q. v. Milwaukee Cnty. Dep't of Soc. Servs. (In the Int. of F.Q.)*, [162 Wis. 2d 607, 470 N.W.2d 1](#) (Ct. App. 1991).

There are a number of other procedural considerations of which the guardian ad litem should be aware. If the fact-finding hearing is to a jury, the guardian ad litem or the court may tell the jury that the guardian ad litem represents the “interests” of the child or unborn child. [Wis. Stat. § 48.235\(6\)](#). The term “best interests” cannot be used, nor may the child’s interests be invoked as a reason justifying relief. *Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, [124 Wis. 2d 47, 70, 368 N.W.2d 47](#) (1985). If the hearing involves a child victim or witness, as defined in [Wis. Stat. § 950.02](#), the court may order the taking of and allow the use of an audiovisually recorded deposition under [Wis. Stat. § 967.04\(7\)–\(10\)](#). [Wis. Stat. § 48.31\(2\)](#). A forensic interview of a child, as authorized by [Wis. Stat. § 908.08](#), may also be used to limit the amount of time a child has to testify during a fact-finding hearing.

In addition, if the child is alleged to be in need of protection or services under [Wis. Stat. § 48.13\(11\)](#), the court cannot find that the child is suffering serious emotional damage unless a licensed physician, specializing in psychiatry, or a licensed psychologist, appointed by the court to examine the child, has testified at the hearing that, in that professional’s opinion, the condition exists. [Wis. Stat. § 48.31\(4\)](#). Adequate opportunity for the cross-examination of the physician or psychologist must also have been afforded. *Id.* The judge may use written reports if the right to have testimony presented is voluntarily, knowingly, and intelligently waived by the guardian ad litem or legal counsel for the child and by the parent or guardian. *Id.*

In cases alleging a child to be in need of protection or services under [Wis. Stat. § 48.13\(11m\)](#) or an unborn child to be in need of protection or services under [Wis. Stat. § 48.133](#), the court cannot find that the child or expectant mother is in need of treatment or education for alcohol or drug abuse unless an alcohol and other drug abuse assessment has been conducted by an approved treatment facility. *Id.*

The court or jury makes findings of fact, and the court makes conclusions of law relating to the allegations in the petition. *Id.* If the court determines that the child or unborn child is not within its jurisdiction, the court will dismiss the petition with prejudice. [Wis. Stat. § 48.31\(2\)](#). If the court determines that the child or unborn child is within its jurisdiction, then at the close of the fact-finding hearing, the court will set a date for the dispositional hearing. [Wis. Stat. § 48.31\(7\)](#). The date should allow the parties a reasonable amount of time to prepare, but the date set may be no more than 10 days after the fact-finding hearing for a child or expectant mother of an unborn child held in secure custody and no more than 30 days after the fact-finding hearing for a child or expectant mother not held in secure custody. *Id.* *But see* [Wis. Stat. § 48.299\(9\)](#) (time periods for Indian children); *see also supra* § 4.22. If all parties consent, the court may proceed immediately with the dispositional hearing, if a disposition report has been completed and filed with the court and distributed to parties. [Wis. Stat. § 48.31\(7\)](#). *But see* [Wis. Stat. § 48.299\(9\)](#).

Practice Tip. A guardian ad litem should have a copy of the Wisconsin Jury Instructions—Children to fully understand the information that is needed to be successful at a fact-finding hearing. Within the jury instructions are definitions and explanations of each of the grounds under [Wis. Stat. § 48.13](#) to determine whether a child is in need of protection or services. There are also case references and information about relevant time frames and possible defenses.

Note. In addition to the procedural requirements for the fact-finding hearing under [Wis. Stat. § 48.31](#), the guardian ad litem should remember that hearing procedure generally under [Wis. Stat. ch. 48](#) is governed by [Wis. Stat. § 48.299](#) and the rules of civil procedure, [Wis. Stat. chs. 801–807](#).

J. Disposition [§ 4.24]

1. In General [§ 4.25]

Once all of the prehearing investigation is completed, and the plea hearing and the fact-finding hearing are held, the court must render a disposition. This disposition must be based on a recommendation by an agency appointed by the court to investigate the case, followed by a hearing at which all interested parties may be present. The requirements for the court report in CHIPS and UCHIPS cases are set forth in [Wis. Stat. § 48.33](#). The requirements for the hearing are in [Wis. Stat. § 48.335](#). At the conclusion of the hearing, the court will issue a dispositional order. [Wis. Stat. § 48.355](#) sets forth the required intent, content, basis, and duration of the dispositional order. [Wis. Stat. § 48.345](#) sets forth the dispositions available to the court for children or unborn children of child expectant mothers found to be in need of protection or services. [Wis. Stat. § 48.347](#) sets forth the dispositions available to the court for unborn children of adult expectant mothers found to be in need of protection or services. [Wis. Stat. § 48.35](#) describes how and when these judgments can be used outside [Wis. Stat. ch. 48](#).

When the court places a child in a certified QRTP, the guardian ad litem should remember that the standardized assessment and judicial findings are needed at the beginning of each placement. The assessment and findings are required when there is no prior order with the required findings for a QRTP placement for the current placement episode for a child. The statutory provisions for a QRTP placement in a CHIPS case make clear that, once the court makes the necessary findings for a QRTP placement, it need not make them again during another stage of the same CHIPS case unless the placement changes. *See generally* [Wis. Stat. § 48.217](#). The Children's Court Improvement Program (CCIP) offers a resource guide for QRTP placements on CCIP's website, <https://www.wiccuptraining.com/> (click "Resources": then choose "QRTP Resource Guide" from "Guides" dropdown) (last visited Sept. 24, 2024).

[Wis. Stat. § 48.345\(3\)](#) limits a child's out-of-home placement, including with a relative or like-kin, with individuals who have been convicted of, pleaded no contest to, or had a charge dismissed or amended as the result of a plea agreement for certain crimes. [Wis. Stat. § 48.345\(3\)](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). These crimes include first- or second-degree sexual assault of a child; engaging in repeated acts of sexual assault of the same child; physical abuse of a child, including intentional causation of bodily harm or engaging in repeated acts of physical abuse of the same child that is a class D felony or higher; sexual exploitation of a child; trafficking of a child; causing a child to view or listen to sexual activity; incest with a child; child enticement; soliciting a child for prostitution; patronizing a child; sexual assault of a child placed in substitute care; exposing a child to harmful material or harmful descriptions or narrations under [Wis. Stat. § 948.11\(2\)\(a\)](#) or (am); possession of child pornography; possession of virtual child pornography; child sex offender working with children; neglecting a child; chronic neglect (repeated acts of neglect); abduction of another's child; constructive custody; child unattended in child-care vehicle; or a similar law of another state. [Wis. Stat. § 48.345\(3\)](#). For placement with any person to whom [Wis. Stat. § 48.345\(3\)\(a\)](#) applies, the court must find by clear and convincing evidence that placement would be in the best interests of the child. This is an important requirement of which every guardian ad litem should be aware as an additional layer of inspection over placements.

2. Court Reports [§ 4.26]

Before the disposition of a case, the court will designate an agency to submit a report. [Wis. Stat. § 48.33\(1\)](#). The report must set forth, among other things, (1) the social history of the child or expectant mother of an unborn child; (2) a recommended plan of rehabilitation or treatment and care for the child or expectant mother that employs the least restrictive means available to accomplish the plan's objectives; (3) the identity of the agency or person recommended to be made primarily responsible for the provision of services; (4) a statement of the plan's objectives, including any desired behavioral changes and the academic, social, and vocational skills needed by the child or expectant mother; (5) a plan for providing educational services to the child; and (6) a statement as to the availability of mental-health services, if they are recommended as part of the plan. *Id.* Agencies should base their reports on the recommended plan of rehabilitation or treatment and care, on their own investigations, which may include any examination or assessment for alcohol and drug use of the child, parent, guardian, or custodian, and on all other pertinent factors. [Wis. Stat. § 48.33\(1\)\(b\)](#). In addition, in cases of child abuse or neglect or unborn child abuse, the court report must include an assessment of the risks to the child's or unborn child's physical safety and physical health and a description of a plan for controlling the risks. *Id.*

[Wis. Stat.](#) § 48.33(2) provides that a report recommending that the child or expectant mother of an unborn child remain in the home may be presented orally at the dispositional hearing if all parties consent. The report must be transcribed and made a part of the court record. [Wis. Stat.](#) § 48.33(2).

A report recommending an out-of-home placement for the adult expectant mother of an unborn child must be in writing. [Wis. Stat.](#) § 48.33(4).

A report recommending placement of a child in a foster home, group home, or residential care center for children and youth, in the home of a relative other than a parent, in the home of like-kin, or in the home of a guardian under [Wis. Stat.](#) § 48.977(2) must be in writing and must include the following:

1. A permanency plan prepared according to the provisions of [Wis. Stat.](#) § 48.38;
2. A recommendation for referral to a child support agency or for an amount of child support to be paid by either or both of the child's parents;
3. Specific information showing that continued placement of the child in the home would be contrary to the child's welfare, that the responsible department or child services agency has made reasonable efforts to prevent the child's removal from the home (absent any of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5.), and that, if a permanency plan has previously been prepared for the child, the responsible department or agency has made reasonable efforts to achieve the permanency goal of the child's permanency plan, including, if appropriate, through an out-of-state placement;
4. Whether the recommended placement is a QRTP certified under [Wis. Stat.](#) § 48.675;

Note. If the report recommends a certified QRTP as placement, the report must contain the standardized assessment with the recommendation of the qualified individual. If the assessment is not completed and filed with the court report, it must be submitted by the dispositional hearing but no later than 30 days after the placement was made. [Wis. Stat.](#) § 48.33(4)(cr)2.

5. Specific information showing that (a) the responsible department has made reasonable efforts to place the child with the child's siblings who are also placed outside the home or to establish frequent visitation among such siblings if joint placement is not recommended, or (b) joint placement or visitation would be contrary to the safety or well-being of the child or any siblings; and
6. If the child is an Indian child who is being removed from the home, additional findings, including specific information showing that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage and that active efforts have been made to prevent the breakup of the Indian child's family, but those efforts have proved unsuccessful.

[Wis. Stat.](#) § 48.33(4)(a), (b), (c), (cm), (cr), (d), (dm). (For the “like-kin” amendments to [Wis. Stat.](#) § 48.33(4), see 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice)).

Under [Wis. Stat.](#) § 48.33(5), if the report recommends placement in a foster home, the names of the foster parents must ordinarily be disclosed. If their names are not available when the report is filed, the agency must provide the court and the child's parents or guardian with the foster parents' names and address within 21 days after the entry of the dispositional order. [Wis. Stat.](#) § 48.33(5). If, however, the court finds that disclosure of the foster parents' names and address would result in imminent danger either to the child or to the foster parents, the court may order the information withheld. *Id.* If the court intends to so order, it must hold a hearing, with notice to the parents or guardian, before ordering the information withheld. *Id.*

For a child's placement to occur in a QRFTF with a parent, the child's permanency plan must list it as a recommendation before the placement. Permanency plans should be filed with or before the dispositional court report under [Wis. Stat.](#) § 48.33. See [Wis. Stat.](#) § 48.38.

Practice Tip. The guardian ad litem should be familiar with the forms created by the Department of Children and Families (DCF) and used by a child protective services agency in a CHIPS case, such as the original disposition report and the permanency plan. See generally Wis. DCF, *Forms Search*, <https://dcf.wisconsin.gov/forms> (last visited Oct. 9, 2024). Of equal importance is to be familiar with the circuit court forms that may accompany these reports, such as the statement of active efforts. See Form [IW-1609](#).

3. Hearing [§ 4.27]

The court will conduct a hearing to determine the disposition of CHIPS and UCHIPS cases. [Wis. Stat.](#) § 48.335(1). At the hearing, any party may present evidence relevant to the disposition, including expert testimony, and may make alternative dispositional recommendations, including placement, legal custody, and conditions of return. [Wis. Stat.](#) § 48.335(3). The dispositional hearing is conducted according to the procedures set forth in [Wis. Stat.](#) § 48.299. It must be held within 10 days after the fact-finding hearing for a child or expectant mother of an unborn child held in secure custody and within 30 days after the fact-finding hearing for a child not held in secure custody. [Wis. Stat.](#) § 48.31(7); *see also T.H. v. La Crosse Cnty. (In the Int. of R.H.)*, [147 Wis. 2d 22](#), 35, [441 N.W.2d 233](#) (Ct. App. 1988), *aff'd by an equally divided court*, [150 Wis. 2d 432](#), [441 N.W.2d 233](#) (1989). *But see* [Wis. Stat.](#) § 48.299(9) (time periods for Indian children); *see also supra* § 4.22. If an out-of-home placement is recommended, evidence must be presented, which can be done by a court accepting into evidence the original disposition report. *See* [Wis. Stat.](#) § 48.335(3g).

Practice Tip. Pursuant to [Wis. Stat.](#) § 48.299(4)(b), neither common law nor statutory rules of evidence are binding at a dispositional hearing (among other hearings). This means a court must admit all testimony having reasonable probative value, including hearsay evidence if it has “demonstrable circumstantial guarantees of trustworthiness.” [Wis. Stat.](#) § 48.299(4)(b).

4. Order [§ 4.28]

In making a dispositional order, the judge must decide on placement and services based on what is presented in court. This order must maintain and protect the well-being of the child or unborn child in a manner that is least restrictive of the rights of the parent and child, or the expectant mother and unborn child. In cases of child abuse or neglect or unborn child abuse, the family unit must be preserved, and the child should be removed from the home only when there is no less drastic alternative. [Wis. Stat.](#) § 48.355(1).

If custody is being transferred from the parent, or if the expectant mother is being placed outside her home, the court must find that there is no less drastic alternative. *Id.* The court must also find that reasonable efforts have been made to prevent the removal of the child from the home while ensuring that the child’s health and safety are the paramount concerns (absent any of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5.). Also, if a permanency plan has been prepared for the child, the court must find that the responsible department or child services agency has made reasonable efforts to achieve the permanency goal of the child’s permanency plan. [Wis. Stat.](#) § 48.355(2)(b)6.

Note. The court may place a child in a QRFTF with a parent as part of a dispositional order. [Wis. Stat.](#) § 48.345(3)(e). Because this is an out-of-home placement, the court must include as part of a dispositional order the required out-of-home placement findings and indicate whether a permanency plan was filed and, if filed, whether reasonable efforts were made to achieve the goals of the plan. *See* [Wis. Stat.](#) § 48.355(2)(b)6. This permanency plan should also include the required language for this placement.

To determine whether reasonable efforts have been made, the court must consider whether the responsible department or agency has offered or provided the child’s family the services listed under [Wis. Stat.](#) § 48.355(2c). Responsible agencies may offer or provide services in addition to those mandated. The court’s consideration of whether reasonable efforts were made includes whether (1) a comprehensive assessment was completed of the family situation, including the likelihood that the child’s health, safety, and welfare will be effectively protected in the home; (2) financial assistance, if applicable, was provided to the family; (3) services for the family, including in-home, community, and specialized services, were offered or provided; (4) monitoring of client progress and participation in the appropriate services was provided; and (5) a consideration of alternative ways of addressing the family’s needs was provided if services are nonexistent or unavailable to the family. [Wis. Stat.](#) § 48.355(2c)(a). The court also must consider whether visitation schedules between the child and parents were implemented, unless visitation was denied or limited by the court. [Wis. Stat.](#) § 48.355(2c)(b).

Caution. Most people think reasonable efforts only include services that an agency provided to the family before removal of a child from the home. As stated above, reasonable efforts encompass more than just services offered.

Practice Tip. It is important for guardians ad litem to understand that time frames for a permanency plan and a dispositional order do not always line up. For example, if a CHIPS case for a child in out-of-home care is pending in a predisposition phase for more than six months, there will be a permanency plan review before the court orders conditions for the child to be returned. Consideration must be given to what a parent was willing to do before a court ordered the conditions for return. What a parent was

not willing to do cannot be held against the parent for the purpose of a termination-of-parental-rights case based on a continuing need for protection or services. Nevertheless, the time in out-of-home care does count toward the time before other permanency arrangements must be considered under AFSA. *See* ASFA, Pub. L. No. 105-89, § 103(a), 111 Stat. 2115, 2118 (codified in part at 42 [U.S.C. § 675\(5\)\(E\)](#)); [Wis. Stat. § 48.417\(1\)\(a\)](#). Therefore, given that the time frames for a termination-of-parental-rights case start when a child is removed, but the court-imposed conditions are not in effect until a dispositional order is made, it is imperative that a guardian ad litem assist in moving cases through the court process.

[Wis. Stat. § 48.355\(2\)\(b\)](#) provides that the court order must be in writing and must contain the specific services to be provided; if custody is to be transferred, the identity of the legal custodian; if the child is to be placed outside the parental home, the name(s) and address of the facility or foster parents, unless the disclosure of the foster parents' identity would result in imminent danger to the child or the foster parents; if any of the specified circumstances under [Wis. Stat. § 48.355\(2d\)\(b\)1.–5.](#) apply, a determination that reasonable efforts to make it possible for the child to return safely home are not required; and, if the order places an adult expectant mother outside her home, the name of the place where she will be treated.

The court order must also contain the expiration date of the order; a statement of the conditions with which the child or expectant mother must comply; a notice of rights to the disclosure of agency records; a designation of the amount of support, if any, to be paid by the child's parents, guardian, or trustee; a statement of the parents' income, assets, debts, and living expenses; a statement relating to the agency's recommended placement, if the court orders an out-of-home placement; and a permanency plan under [Wis. Stat. § 48.38](#). [Wis. Stat. § 48.355\(2\)\(b\)](#). The permanency plan is discussed in more detail in sections [4.38–42](#), *infra*.

If the child is placed outside the home under the supervision of the county department (or, in Milwaukee County, the DCF), the dispositional order must also include an order ordering the child into the placement and care responsibility of the county department (or the DCF), as required under 42 [U.S.C. § 672\(a\)\(2\)](#), and assigning responsibility for providing services to the child. [Wis. Stat. § 48.355\(2\)\(b\)6g](#).

If the child has been placed outside the home and has one or more siblings in out-of-home placements, the dispositional order must (1) include a finding about whether the responsible agency has made reasonable efforts to place the siblings together, unless joint placement would be contrary to the safety or well-being of the child or any siblings; or (2) order the responsible agency to make reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and siblings, unless it would be contrary to the safety or well-being of the child or any siblings. [Wis. Stat. § 48.355\(2\)\(b\)6p](#).

The court must make additional findings if the child is an Indian child who is being removed from the home of the child's parent or Indian custodian and placed outside the home. *See* [Wis. Stat. § 48.355\(2\)\(b\)6v](#).

If a CHIPS dispositional order places a child in a residential care center, group home, or shelter care facility certified as a QRTP under [Wis. Stat. § 48.675](#) (and there is not a prior order for the same placement for the same episode), the order must include the required findings for placement in a QRTP. [Wis. Stat. § 48.355\(2\)\(b\)6d](#). Findings must be made but do not affect whether the placement may be made. Similar to the time frames for QRTP placements under other statutes, if the court does not have the assessment at the time of the entry of the dispositional order, the court must issue an order with the required findings no more than 60 days after the date of placement. [Wis. Stat. § 48.355\(2\)\(cd\)](#).

While the statutes require that specific services be identified, it is enough for the court order to require supervision, case management, and services, without additional particularity, so long as the parents' conditions of return are clearly spelled out. By implication, the services that are required will include services needed to permit the parents to meet the conditions. *See Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Tanya M.B. (In re Termination of Parental Rts. to Elijah W.L.)*, [2010 WI 55](#), [325 Wis. 2d 524](#), [785 N.W.2d 369](#).

Practice Tip. The author recommends that guardians ad litem insist on specific, particularized services rather than the general language approved by the Wisconsin Supreme Court as being sufficient to permit a subsequent termination of parental rights. If specific services are spelled out, the proof at a termination-of-parental-rights trial will be whether reasonable efforts to provide such services were made—not whether the services themselves were sufficient. If the general approach is used, there will likely be a dispute over whether the services were sufficient or whether alternative and better services could and should have been provided. To avoid this, a CHIPS dispositional order should list specific services. Further conditions of return should be clear and, if possible, written to measure progress.

Under [Wis. Stat. § 48.355\(2m\)](#), the court order may include provisions for transitional placements but must not designate specific times when transitions are to take place. [Wis. Stat. §§ 48.357 and 48.363](#) govern when such transitions take place. The court may, however, place specific time limitations on interim arrangements made for the care of the child or treatment of an expectant mother of an unborn child pending the availability of the dispositional placement. [Wis. Stat. § 48.355\(2m\)](#). The court cannot designate shelter care as the placement for a child in the CHIPS dispositional order. [Wis. Stat. § 48.345\(3\)\(d\)](#) allows the juvenile court to place a child in a residential care center for children and youth operated by a child welfare agency licensed under [Wis. Stat. § 48.60](#) or in similar facilities regulated in another state; however, shelter care is not a “residential care center for children and youth.” Cf. [Wis. Stat. § 48.02\(17\)](#) (defining *shelter care facility* as facility licensed under [Wis. Stat. § 48.66\(1\)\(a\)](#)).

Under [Wis. Stat. § 48.355\(3\)](#), a judge who finds that visitation would be in the best interest of the child may set reasonable rules of parental visitation after a hearing on the issue, for which due notice was given to the parents or guardian.

To protect the court record if the child or expectant mother is placed outside the home or a parent has been denied visitation, the dispositional order and all subsequent court orders must contain the possible grounds for TPR under [Wis. Stat. § 48.415](#) and the conditions necessary for the child or the expectant mother of an unborn child to be returned to the home or for the parent to be granted visitation. [Wis. Stat. § 48.356\(2\)](#). The duty of oral warnings stated in court, pursuant to [Wis. Stat. § 48.356\(1\)](#), or written warnings mailed to the parents separate from the order are not sufficient. The inclusion of the [Wis. Stat. § 48.415](#) grounds in the court order is a jurisdictional requirement for the filing of a TPR petition under [Wis. Stat. § 48.415\(1\)\(a\)2](#). (abandonment for three or more months) and [48.415\(2\)](#) (continuing need of protection or services). Failure to include the required warnings could mean that a child must remain in foster care rather than become eligible for adoption.

Practice Tip. The guardian ad litem should ensure that, upon receipt of a dispositional order placing a child in an out-of-home placement, the conditions for return and a copy of the notice of grounds to terminate parental rights are attached to the order.

The permanency plan must be consistent with the court order and is made part of that order. See [Wis. Stat. § 48.355\(2e\)\(a\)](#). Each time a child’s placement is changed under [Wis. Stat. § 48.32](#) or [48.357](#), a trial reunification is ordered under [Wis. Stat. § 48.358](#), a consent decree is revised under [Wis. Stat. § 48.32](#), or a dispositional order is revised under [Wis. Stat. § 48.363](#) or extended under [Wis. Stat. § 48.365](#), the agency that prepared the permanency plan must revise the plan to conform to the order and must file a copy of the revised plan with the court. [Wis. Stat. § 48.355\(2e\)\(b\)](#).

In most CHIPS and UCHIPS cases, the allegations are not tried to judge or jury, and except when psychological evaluations are required, the proceedings should move relatively quickly. Before the dispositional hearing, it is good practice for the guardian ad litem to meet with the social worker and, if possible, the district attorney or corporation counsel, to put together recommendations for the original disposition report submitted by the agency. The dispositional order, which can be based on the report, is a very important document for the child. If the dispositional order is to be done properly and in the child’s best interest, a great deal of thought must be put into the report and recommendations before the hearing.

5. Role of the Guardian ad Litem [§ 4.29]

The guardian ad litem must make independent conclusions on what is in a child’s best interest when seeking records and meeting with the child, parties, and other professionals involved. After evaluating discovery and reviewing the agency’s disposition report, the guardian ad litem should explore opportunities to reach a stipulation and to facilitate the case through the court system. The guardian ad litem must use sound judgment in determining the parameters of negotiation, always keeping in mind that the dispositional order is crucial to the child’s or unborn child’s present and future best interests. Upon receiving the draft of a final order, the guardian ad litem must make certain that it accurately includes all provisions that the guardian ad litem seeks to be made part of the order.

The guardian ad litem should also ensure that the order spells out the specific and relevant behavior required of the parents to facilitate the treatment plan if the child or expectant mother is to remain in the parental home or for them to meet the conditions established for the return of the child or expectant mother to the home. Ordinarily, it will be in the child’s best interest to maximize the opportunities for the parent to obtain services that address the underlying causes of abuse or neglect.

When a child has been removed from the parental home, TPR or guardianship may be the optimal way for the child to realize a stable and secure future. In almost all cases in which the child is in an out-of-home placement, the guardian ad litem cannot reliably predict at the time of the dispositional order whether the child will reunify with the child’s parents or achieve permanency in another

way. The guardian ad litem should ensure that the dispositional order contains specific and relevant conditions that must be met for the child to be returned to the parental home. Requirements for both parents must be set forth, even for a parent who has been absent from the child's life for a long time. The court order must be exact and specific as to what the parents must do, keeping in mind that parental compliance with all court orders determines whether the child will be returned home. The order containing these behavioral requirements should be crafted in a manner that will give the parents the utmost and clearest guidance and will give the child the greatest opportunity for permanent placement at the end of the dispositional order period, whether through reunification, guardianship, adoption, permanent placement with a fit and willing relative, or in a small number of cases through some other planned permanent living arrangement (sometimes referred to as an OPPLA).

When fashioning requirements for parental behavior, the guardian ad litem should be satisfied that if the parents meet these requirements, their respective homes will be of sufficient support and stability for the child's return. For example, would it serve the child's best interests to state that "the parents shall attend parenting classes" when the parents may be unable or unwilling to attend or benefit from such daily or weekly classes? It presumably would be far more beneficial to state, "the parents shall attend parenting classes and shall demonstrate to the court, through the testimony of the social worker, the foster parents, or the evaluating psychologist selected by the court, appropriate parenting skills."

At the close of a dispositional hearing at which a child or the expectant mother of an unborn child is placed outside the parental home or a parent is denied visitation, the guardian ad litem should make certain that the judge has warned the parents or expectant mother of any possible future grounds for TPR under [Wis. Stat. § 48.415](#). The judge must, on the record, inform the parents, who appear in court, of the grounds for TPR that may be applicable and of the conditions necessary for the child or expectant mother to be returned to the home or for the parent to be granted visitation, including any changes required in the parents' or expectant mother's conduct, the nature of the home, and the child's or child expectant mother's conduct. See [Wis. Stat. § 48.356\(1\)](#). As previously stated, in addition to the oral warning, the written order that places the child or expectant mother outside the home or denies visitation must contain notification to the parents or expectant mother of the [Wis. Stat. § 48.415](#) potential grounds for TPR applicable to them and of the conditions necessary for return to the home or for visitation. [Wis. Stat. § 48.356\(2\)](#). If any of these provisions is overlooked, it is unlikely that a TPR petition based on this dispositional order will result in an order for termination of parental rights.

Note. A companion provision in [Wis. Stat. § 767.41\(4\)\(cm\)](#) requires a family court that denies periods of physical placement under [Wis. Stat. ch. 767](#) to warn the parents that parental rights may be terminated if physical placement is denied for at least one year. As a practical matter, this warning should be made orally and as part of the written family court order. This ground is also available if the same situation were to occur under a CHIPS dispositional order for one year. [Wis. Stat. § 48.415\(4\)](#).

The guardian ad litem's appointment terminates automatically upon the entry of the court's dispositional order or upon the termination of any appeal in which the guardian ad litem participates. [Wis. Stat. § 48.235\(7\)](#). The court can continue a guardian ad litem's appointment under a consent decree or dispositional order by indicating so on the respective order. There is a finding on each order that allows for a guardian ad litem to continue to perform any duties under [Wis. Stat. § 48.235\(4\)](#). See, e.g., Forms [JC-1611](#), [JD-1784B](#), [JD-1785B](#). At any time, the guardian ad litem, any party, or the child may request in writing or on the record that the court extend or terminate the guardian ad litem's appointment or that the court reappoint the guardian ad litem. *Id.* The court may extend the appointment or reappoint a guardian ad litem; however, the court must state specifically the scope of the responsibilities of the guardian ad litem during the period of extension or reappointment. *Id.* If the guardian ad litem is to continue representing the best interests of the child, the court's extension or reappointment should be stated in the dispositional order. See section [4.6](#), *supra*, for information on the guardian ad litem's specific responsibilities after the court has issued its dispositional order.

K. Postdisposition [§ 4.30]

1. Change in Placement [§ 4.31]

A notice or request for a change in placement can apply to existing orders for placement outside or in the parental home. The person or agency primarily responsible for implementing the dispositional order, the district attorney, or the corporation counsel may request a change in placement, whether or not the dispositional order authorizes the change requested, by causing written notice to be sent. [Wis. Stat. § 48.357\(1\)\(a\)](#).

A change in placement outside the home to another placement outside the home requires written notice of the proposed change in placement to be sent to the child, the child's counsel or guardian ad litem, the child's parents, guardian, and legal custodian, any foster

parent or other physical custodian of the child under [Wis. Stat.](#) § 48.62(2), the child's court-appointed special advocate, and, if the child is an Indian child who has been removed from the home of the child's parent or Indian custodian, the Indian child's Indian custodian and tribe. [Wis. Stat.](#) § 48.357(1)(am)1.a. The notice must contain the name and address of the new placement, the reasons for the proposed change in placement, a statement describing why the new placement is preferable to the present placement, and a statement of how the new placement satisfies the objectives of the treatment plan or permanency plan ordered by the court. [Wis. Stat.](#) § 48.357(1)(am)1.c. The procedure for the notice of change in placement requires that the person sending the notice file it with the court on the same day that the notice is sent. *Id.* Any party receiving this notice, except a court-appointed special advocate, may obtain a hearing on the matter by filing a written objection with the court within 10 days after the notice is filed with the court. [Wis. Stat.](#) § 48.357(1)(am)2. If an objection is filed within the 10 days, the court must hold a hearing before ordering any change in placement, unless emergency conditions necessitate an immediate change in placement. At least 3 days before the hearing, the court must provide notice of the hearing to all persons who are entitled to receive notice.

When the change in placement would remove a child from a foster home or other physical custodian, the court must give the foster parent or other physical custodian a right to be heard at the hearing. The foster parent or other physical custodian does not become a party to the proceeding but may be heard by a written or oral statement during the hearing or can submit a written statement before the hearing. [Wis. Stat.](#) § 48.357(2r). If all parties consent, the court may proceed immediately with the hearing. If no objection is filed within 10 days after that notice is filed with the court, the court must enter an order changing the child's placement as proposed in that notice. Placements cannot be changed until 10 days after the notice of a proposed change is sent to and filed with the court unless the parties sign written waivers of objection as provided by [Wis. Stat.](#) § 48.357(1)(am)2., or unless there is an emergency condition that necessitates an immediate change in placement. Any placement changes authorized in the dispositional order, however, may be made immediately if proper notice is given, unless a person who received notice files an objection alleging new information that affects the advisability of the dispositional order. [Wis. Stat.](#) § 48.357(1)(am)2m.

The appointment or extended appointment of a guardian ad litem does not apply to a child who is subject to a dispositional order that continues as provided in [Wis. Stat.](#) § 48.357(6)(a)4. for a child up to age 21. [Wis. Stat.](#) § 48.235(1)(e). At any time after the child attains 18 years of age, the child, or the child's guardian on behalf of the child, may request the court in writing to terminate the order and, on receipt of such a request, the court, without a hearing, must terminate the order. [Wis. Stat.](#) § 48.357(6)(a)4.

A request to change placement from in the home to placement outside the home requires the person or agency primarily responsible for implementing the dispositional order, the district attorney, or the corporation counsel to submit a request for change in placement to the court. The request must contain the name and address of the new placement, the reasons for the change of placement, and a statement describing how the new placement satisfies the objectives of the treatment plan or permanency plan ordered by the court. The request also must show that continued placement of the child in the child's home would be contrary to the welfare of the child, and (absent any of the specified circumstances in [Wis. Stat.](#) § 48.355(2d)(b)1.–5.) that the agency primarily responsible has made reasonable efforts to prevent removal of the child from the home, while ensuring that the child's health and safety are the paramount concerns. [Wis. Stat.](#) § 48.357(1)(c)1.

The court must hold a hearing before ordering a change in placement to make the out-of-home findings that continued placement in the child's home would be contrary to the child's welfare and that the agency made reasonable efforts to prevent the removal. At least three days before the hearing, the court must provide notice of the hearing, along with a copy of the request for the change in placement, to the child, the child's counsel or guardian ad litem, the child's parents, guardian, and legal custodian, the person or agency primarily responsible for implementing the dispositional order, the district attorney or corporation counsel, any foster parent or other physical custodian, the child's court-appointed special advocate, and, if the child is an Indian child, the Indian child's Indian custodian and tribe. [Wis. Stat.](#) § 48.357(1)(c)2. If all parties consent, the court may proceed immediately with the hearing, except that any party seeking the change in placement must comply with the ICWA provisions in [Wis. Stat.](#) § 48.357(1)(c)2r., including testimony by a qualified expert witness.

Emergency conditions may necessitate immediate changes in a child's or expectant mother's placement. *See* [Wis. Stat.](#) § 48.357(2). Therefore, a child may already be placed outside the home under a temporary physical custody order during a hearing for a postdispositional change of placement from in the home to outside the home.

A guardian ad litem should be aware of all placement options, including the option for a child to be placed in a Q RTP. It is important for any guardian ad litem to ensure the correct findings are made, that the child needs the change in placement, and that its duration is only for as long as necessary. The agency worker who requests the change of placement must provide the following information to the court to be memorialized in the court's order: an assessment that the needs of the child cannot be met through

placement in a foster home, the placement provides the most effective and appropriate level of care in the least restrictive environment, and the placement is consistent with the short-term and long-term goals in the child's permanency plan. [Wis. Stat. § 48.357\(1\)\(am\)1m](#). The assessment must also state the family permanency team's placement preference and, if the qualified individual does not recommend that placement, the assessment must explain why that placement is not preferred. *Id.*

Practice Tip. In considering what position to take with respect to a change in placement, the guardian ad litem should take into account the child's age, the child's attachment to the foster family, whether the new placement is with a relative or like-kin, whether the new placement could allow for sibling placement together, the conditions in the foster home, and the probable length of time before another change is likely. The guardian ad litem should investigate the circumstances thoroughly before agreeing to a change in placement.

2. Revision of Orders [§ 4.32]

Dispositional orders may be revised under [Wis. Stat. § 48.363](#). The parent, child, expectant mother, unborn child's guardian ad litem, guardian, legal custodian, Indian custodian, or any person or agency bound by a dispositional order may request a revision that does not involve a change in placement or a trial reunification. [Wis. Stat. § 48.363\(1\)\(a\)](#). The court may also propose a revision on its own motion. *Id.* The request or court proposal must set forth in detail the nature of the proposed revision and what new information is available that affects the current dispositional order. *Id.* The request must be submitted to the court for the court to hold a hearing on the matter if the request indicates that new information is available. *Id.* The revision must not extend the effective period of the original dispositional order without an extension order pursuant to [Wis. Stat. § 48.365](#). [Wis. Stat. § 48.363\(1\)\(b\)](#).

3. Extension of Orders [§ 4.33]

Under [Wis. Stat. § 48.365\(1m\)](#), the parent, child, expectant mother, unborn child's guardian ad litem, guardian, legal custodian, Indian custodian, any person or agency bound by the dispositional order, or the court on its own motion may request the extension of an order. The request must be submitted to the court, and the court must hold a hearing before granting the extension. [Wis. Stat. § 48.365\(2\)](#). If a TPR petition is filed under [Wis. Stat. § 48.41](#) or [48.415](#), or if an appeal from a judgment terminating or denying termination of parental rights is filed during the year in which a dispositional or extension order is in effect, the dispositional or extension order remains in effect until all proceedings relating to the filing of the TPR petition or the appeal are concluded. [Wis. Stat. § 48.368\(1\)](#).

The guardian ad litem should carefully consider a request for an extension to ensure that the extension, if granted, will be in the best interest of the child. The extension must not be granted simply to maintain the status quo. The extension of an order must serve the purpose of helping a child achieve permanency.

At the extension hearing, the person or agency primarily responsible for providing services to the child or the expectant mother of an unborn child must file with the court a written report stating to what extent the dispositional order has been meeting the plan's objectives for the child's rehabilitation or care and treatment or for the expectant mother's rehabilitation and treatment and for the unborn child's care. [Wis. Stat. § 48.365\(2g\)\(a\)](#). [Wis. Stat. § 48.365\(2m\)\(a\)](#) requires the court to make an evidentiary finding as to whether the responsible agency has made reasonable efforts to achieve the permanency goal of the child's permanency plan. [Wis. Stat. § 48.355\(2m\)\(a\)1.](#); *see also* [Wis. Stat. § 48.355\(2c\)](#); *see also supra* [§ 4.28](#) (reasonable efforts standard). If the child is an Indian child who has been placed outside the home, [Wis. Stat. § 48.365\(2m\)\(a\)](#) also requires the court to make a finding that active efforts were made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

Note. In most counties, extension hearings for out-of-home placements are rare. Most out-of-home dispositional orders expire on the latest of the following dates: one year after the date of the order; the date the child reaches the child's 18th birthday; or, if the child is still a full-time student expected to complete a program for a high school or high school equivalency diploma before attaining age 19, the date on which the child is granted the diploma or the date the child reaches the child's 19th birthday. [Wis. Stat. § 48.355\(4\)](#).

If the child has not been placed outside the home, the report must contain a description of efforts that have been made by all parties concerned toward meeting the objectives of treatment, care, or rehabilitation; an explanation of why these efforts have not yet succeeded in meeting the objectives; and anticipated future planning for the child. [Wis. Stat. § 48.365\(2g\)\(c\)](#).

If the child has been placed outside the home, the report must include a copy of the review panel's report under [Wis. Stat. § 48.38\(5\)](#) and a response to the report from the agency primarily responsible for providing services to the child. [Wis. Stat. § 48.365\(2g\)\(b\)1](#). The report must also include the following: (1) an evaluation of the child's adjustment to the placement and of any progress the child has made; (2) suggestions for amendment of the permanency plan; and (3) specific information showing the efforts that have been made to achieve the permanency goal of the permanency plan, including, if applicable, efforts of the parents to remedy the factors that contributed to the child's placement. [Wis. Stat. § 48.365\(2g\)\(b\)2](#).

If a child has been placed outside the child's home in a foster home, group home, nonsecured residential care center for children and youth, or shelter care facility for 15 of the most recent 22 months (not including any period during which the child was a runaway from the out-of-home placement or residing in a trial reunification home), the report required under [Wis. Stat. § 48.365\(2g\)](#) must state whether a recommendation has been made to terminate the parental rights of the parents of the child. [Wis. Stat. § 48.365\(2g\)\(b\)3](#). The time during which a child is considered to have been placed outside the home begins with the date on which the child was first removed from the child's home, *not* when placed under the dispositional order. See [Wis. Stat. § 48.365\(1\)](#).

If the child is an Indian child who is placed outside the home of the child's parent or Indian custodian, the report must also include specific information showing that active efforts have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful. [Wis. Stat. § 48.365\(2g\)\(ag\)4](#). This is now commonly done with the state court form "statement of active efforts," Form [IW-1609](#).

If a recommendation for TPR has been made, the report must indicate the date on which the recommendation was made, any progress made to accomplish TPR, any barriers to TPR, the specific steps needed to overcome the barriers and a timetable for the completion of these steps, the reasons why adoption would be in the best interest of the child, and whether the child should be registered with the adoption information exchange. [Wis. Stat. § 48.365\(2g\)\(b\)3](#). If the recommendation for TPR has not been made, the report must include an explanation of the reasons for the failure to make such a recommendation. *Id.* If the lack of appropriate adoptive resources is the primary reason for not recommending TPR, the agency must recommend that the child be registered with the adoption information exchange or state why registering the child is contrary to the child's best interests. *Id.*

At the hearing on the extension, any party may present evidence relating to the issue of extension. [Wis. Stat. § 48.365\(2m\)\(a\)1](#). The judge must make findings of fact and conclusions of law based on the evidence and issue an order consistent with the requirements of [Wis. Stat. § 48.355](#). [Wis. Stat. § 48.365\(2m\)\(a\)1m](#). Evidence should be taken by testimony, sworn statements, or stipulated documents, such as a court report. *Green Cnty. Dep't of Hum. Servs. v. David L. (In the Int. of Jessica R.L.)*, Nos. [01-0755-FT](#), [01-0756-FT](#), 2001 WL 923439 (Wis. Ct. App. Aug. 16, 2001) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

Among other requirements (and the attorney should review the applicable statutes), the judge must state on the record the reason for the extension. The judge must also grant the order for a specified length of time not to exceed one year after the date on which the order is granted, if the order continues the placement of the child in the child's home or if it relates to an unborn child of an adult expectant mother. [Wis. Stat. § 48.365\(2m\)\(b\), \(5\)](#). If the order instead continues an out-of-home placement for the child, then the order must be of a specified duration not to exceed the latest of the following dates: (1) the date on which the child attains age 18; (2) the date that is one year after the date on which the order is granted; (3) if the child is a qualified student under [Wis. Stat. § 48.365\(5\)\(b\)3](#)., the date on which the child is granted a high school or high school equivalency diploma or the date on which the child attains age 19, whichever occurs first; or (4) if the child is a qualified student under [Wis. Stat. § 48.365\(5\)\(b\)4](#)., the date on which the child is granted a high school or high school equivalency diploma or the date on which the child attains age 21, whichever occurs first. [Wis. Stat. § 48.365\(5\)\(b\)](#). If a request to extend a dispositional order is made before the termination of the order and the court is unable to conduct a hearing on the request before the termination date, the court may extend the order without a hearing for a period of not more than 30 days, not including any period of delay resulting from any of the circumstances specified in [Wis. Stat. § 48.315\(1\)](#), to allow time for the hearing to be scheduled. [Wis. Stat. § 48.365\(6\)](#). Only one such extension is permitted under [Wis. Stat. § 48.365\(6\)](#); however, good-cause extensions pursuant to [Wis. Stat. § 48.315](#) are permitted if granted on the record.

Note. Failure to object if a hearing is not held within the time period under [Wis. Stat. § 48.365\(6\)](#) waives any challenge to the court's competency to act on the request. *Id.*

4. Termination of Orders [§ 4.34]

a. In General [§ 4.35]

The termination of a dispositional order varies, depending on the placement of the child and whether the proceeding involves an unborn child. A dispositional order for a child under [Wis. Stat. § 48.355](#) (or a change-of-placement order under [Wis. Stat. § 48.357](#) or an extension under [Wis. Stat. § 48.365](#)) that places or continues the placement of the child in the child's home will terminate one year after the date on which the order is granted, unless the judge specifies a shorter period of time or the court terminates the order earlier. [Wis. Stat. § 48.355\(4\)\(a\)](#). Similarly, in a UCHIPS proceeding, a dispositional order (or an order for a change of placement or an extension) made before the unborn child is born will terminate one year after the date on which the order is granted, unless the judge specifies a shorter period of time or terminates the order sooner. [Wis. Stat. § 48.355\(4\)\(c\)](#).

If the order for a child places or continues the placement in a foster home, group home, or residential care center for children and youth, in a home of a relative other than a parent, the home of like-kin, or in a supervised independent living arrangement, then the order will terminate on the latest of the following dates, unless the judge specifies a shorter period or terminates the order sooner: (1) the date on which the child attains age 18; (2) the date that is one year after the date on which the order is granted; (3) if the child is a qualified student under [Wis. Stat. § 48.355\(4\)\(b\)3.](#), the date on which the child is granted a high school or high school equivalency diploma or the date on which the child attains age 19, whichever occurs first; or (4) if the child is a qualified student under [Wis. Stat. § 48.355\(4\)\(b\)4.](#), the date on which the child is granted a high school or high school equivalency diploma or the date on which the child attains 21 years of age, whichever occurs first. [Wis. Stat. § 48.355\(4\)\(b\)](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). The appointment or extended appointment of a guardian ad litem does not apply to a child who is subject to a dispositional order that continues in this manner up to the child attaining age 21. [Wis. Stat. § 48.235\(1\)\(e\)](#). At any time after the child attains 18 years of age, the child or the child's guardian on behalf of the child may request the court in writing to terminate the order and, on receipt of such a request, the court, without a hearing, must terminate the order. [Wis. Stat. § 48.355\(4\)\(b\)4.](#)

The guardian ad litem should be prepared to make a recommendation on behalf of a child who is in out-of-home placement, has an individualized education program (IEP) in effect under [Wis. Stat. § 115.787](#), and may be eligible to continue in out-of-home placement beyond attaining age 18, as to whether to continue such placement up to 21 years of age for the purpose of receiving a high school diploma or its equivalent. If the child is a full-time student at a secondary school or its vocational or technical equivalent and has an IEP in effect under [Wis. Stat. § 115.787](#), the court cannot grant an order that terminates under [Wis. Stat. § 48.355\(4\)\(b\)4.](#) unless the child is 17 years of age or older when the order is granted and the child, or the child's guardian on behalf of the child, agrees to the order. *Id.* The appointment of a guardian ad litem does not apply to a child who is subject to this type of extended order. [Wis. Stat. § 48.235\(1\)\(e\)](#).

b. Case Closure Orders [§ 4.36]

[Wis. Stat. ch. 48](#) allows for a CHIPS dispositional order to terminate and for the juvenile court to modify an existing order in an action affecting the family in any Wisconsin circuit court. There must be a pending action for divorce, annulment, legal separation, or paternity, or the child must be subject to an independent action to determine legal custody or visitation rights. [Wis. Stat. § 48.355\(4g\)\(a\)1.](#) If there is not one of these orders at least pending, the juvenile court can modify an existing order that has been granted affecting the family determining legal custody, periods of physical placement, visitation rights, child support, or responsibility for health-care coverage. [Wis. Stat. § 48.355\(4g\)\(a\)2.](#) The request to modify the existing family court order to terminate the CHIPS dispositional order can be made by the child or the child's counsel or guardian ad litem, the child's parent, guardian, legal custodian, or Indian custodian, the person or agency responsible for implementing the dispositional order, or the district attorney or corporation counsel. [Wis. Stat. § 48.355\(4g\)\(b\).](#)

The court must have a hearing on the request, with notice provided at least five days before the hearing to the child, the child's counsel or guardian ad litem, the child's parent, guardian, and legal custodian, the person or agency primarily responsible for implementing the dispositional order, the district attorney or corporation counsel, the child's court-appointed special advocate, and, if the child is an Indian child, the child's Indian custodian and tribe. [Wis. Stat. § 48.355\(4g\)\(c\)](#). The court's order must be determined based on the standards and requirements under [Wis. Stat. ch. 767](#). See [Wis. Stat. § 48.355\(4g\)\(d\)](#). The order created through this case-closure process is enforceable under [Wis. Stat. ch. 767](#). See [Wis. Stat. § 48.355\(4g\)\(g\), \(h\), \(i\)](#).

For a court to hear a motion for a case-closure order, the child must be under a dispositional order under [Wis. Stat. ch. 48](#) (or a change-in-placement order or an extension order), and that order must terminate with this court's order. [Wis. Stat. § 48.355\(4g\)](#).

L. Rehearing and Appeal [§ 4.37]

Once the notice of intent to pursue postdisposition relief is filed, various steps occur in the appellate process. *See generally* [Wis. Stat. § 809.30](#). First, in general, the party seeking the appeal must request the transcript, and may request a copy of the circuit court case record, within 30 days after filing the notice of intent to pursue postdisposition relief. [Wis. Stat. § 809.30\(2\)\(f\)](#). The clerk of circuit court must serve a copy of the circuit court case record within 60 days after receiving the request. [Wis. Stat. § 809.30\(2\)\(g\)1](#). Within 60 days after the request for the transcript is made, the court reporter must file the original transcript with the circuit court and serve a copy on the requesting party. [Wis. Stat. § 809.30\(2\)\(g\)2](#). Either a motion for postdisposition relief (not a motion for reconsideration) or a notice of appeal must be filed within 60 days after the later of service of the transcript or service of the circuit court case record. [Wis. Stat. § 809.30\(2\)\(h\)](#).

The guardian ad litem may choose whether to participate in the appeal. [Wis. Stat. § 48.235\(7\)](#). If the guardian ad litem decides not to participate in the appeal, the guardian ad litem must notify the court of appeals of that decision within 20 days after the filing of the appellant's brief. [Wis. Stat. § 809.19\(6m\)](#). The court of appeals may nonetheless order the guardian ad litem to participate. [Wis. Stat. § 48.235\(7\)](#). Ordinarily, the guardian ad litem should participate in the appeal in order to protect the child's or unborn child's interests, even if that means merely joining in the brief filed by another party.

If the guardian ad litem participates and is aligned with the appellant, the guardian ad litem must file a brief within 40 days after the filing of the record. [Wis. Stat. § 809.19\(6m\)](#). If aligned with the respondent, the guardian ad litem must file a brief within 30 days after the filing of the appellant's brief. *Id.*

In the alternative, if new evidence is discovered within one year after entry of the court's original adjudication of the child's status, the parent, guardian, legal custodian, or child may petition for a rehearing. [Wis. Stat. § 48.46\(1\)](#). The one-year period for petitioning for a rehearing based on new evidence also applies to unborn children and expectant mothers. *Id.* If adequate new evidence is shown, the court must order a new hearing. *Id.*

M. Permanency Planning [§ 4.38]

1. In General [§ 4.39]

Every aspect of the juvenile court process is affected by the principles of permanency planning. The main guidelines for implementing these principles are found in [Wis. Stat. § 48.38](#). The statute defines the permanency plan as "a plan designed to ensure that a child is reunified with his or her family whenever appropriate, or that the child quickly attains a placement or home providing long-term stability." [Wis. Stat. § 48.38\(1\)\(b\)](#).

The guardian ad litem should be involved in the planning and discussion of permanency options for a child. A QRTP, although necessary to serve certain children in the community, is not a permanent resource for children. Therefore, by advocating for a child's best interest in a CHIPS case, a guardian ad litem should help to ensure that a child does not stay in a QRTP placement longer than necessary.

A family permanency team is required if a child is placed in a QRTP. This team should be invited to participate in the child's permanency planning and can include all appropriate biological family members, relatives, and like-kin of the child; professional resources for the family such as teachers, mental health providers, or clergy; and individuals identified by the child if the child is 14 years of age or older. [Wis. Stat. § 48.38\(3m\)](#). The statute defines *like-kin*, in part, as "an individual who has a significant emotional relationship with a child or the child's family that is similar to a familial relationship and who is not and has not previously been the child's licensed foster parent." [Wis. Stat. § 48.02\(12c\)](#), *as created by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). Others, including a child's guardian ad litem, may be invited to the permanency team at the agency's discretion. [Wis. Stat. § 48.38\(3m\)](#).

Note. For purposes of selecting participants for the family permanency team, "like-kin" may include an individual who is or previously was the child's licensed foster parent." [Wis. Stat. § 48.38\(3m\)\(a\)](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

2. Implementation of the Permanency Plan [§ 4.40]

[Wis. Stat.](#) § 48.38 provides that a written permanency plan must be prepared for each child living in a foster home, group home, residential care center for children and youth, juvenile detention facility, shelter care facility, QRFTF with a parent, or supervised independent living arrangement if any of the following conditions exists:

1. The child is being held in physical custody under [Wis. Stat.](#) § 48.207 (nonsecure custody), 48.208 (juvenile detention facility), or 48.209 (county jail).
2. The child is in the legal custody of the responsible agency.
3. The child is under the supervision of an agency under [Wis. Stat.](#) § 48.64(2) (for a foster home or group home placement), under a consent decree under [Wis. Stat.](#) § 48.32(1)(b), or under a dispositional order under [Wis. Stat.](#) § 48.355.
4. The child was placed under a voluntary agreement between the agency and the child's parent under [Wis. Stat.](#) § 48.63(1)(a) or 48.63(5)(b) or under a voluntary transition-to-independent living agreement under [Wis. Stat.](#) § 48.366(3).
5. The child is under the guardianship of the responsible agency.
6. The child's care would be paid for under the AFDC provisions of [Wis. Stat.](#) § 49.19 but for the elimination of that program, as provided by [Wis. Stat.](#) § 49.19(20), except for a child whose care is being paid for under [Wis. Stat.](#) § 48.623(1) (subsidized guardianships).
7. The child's parent is placed in a foster home, group home, residential care center for children and youth, juvenile detention facility, shelter care facility, or supervised independent living arrangement, and the child is residing with that parent.

[Wis. Stat.](#) § 48.38(2). For a child living in the home of a guardian or a relative other than a parent, or in a like-kin placement, the responsible agency must prepare a written permanency plan if any of the first five conditions in the above list exists. *Id.*, as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). The plan must be filed with the court within 60 days after the date on which the child was first removed from the child's home. [Wis. Stat.](#) § 48.38(3).

The permanency plan must state the goal and the rationale for deciding on the goal of the permanency plan or, if the agency is engaging in concurrent planning, as defined in [Wis. Stat.](#) § 48.355(2b)(a), the permanency and concurrent permanency goals of the permanency plan. [Wis. Stat.](#) § 48.38(4)(fg). The permanency plan must include a description of the services offered and any services provided to prevent removal of the child from the home and to achieve the goal of the permanency plan (unless the specified circumstances in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. apply). [Wis. Stat.](#) § 48.38(4)(ar). It must also address changes in schools and contain pertinent education-related and medical information. [Wis. Stat.](#) § 48.38(4)(dg), (dm), (dr). It must also state the basis for the decision to place the child. [Wis. Stat.](#) § 48.38(4)(b). In the case of a child 16 years of age or over, if the agency determines that there is a compelling reason why it currently would not be in the child's best interests for reunification, guardianship, adoption, or permanent placement with a fit and willing relative, the plan may be some other planned permanent living arrangement. This plan must be supplemented with efforts made to achieve the other permanency goals. [Wis. Stat.](#) § 48.38(4)(fm). [Wis. Stat.](#) § 48.38(4) has several other requirements not detailed above; the attorney should be familiar with the applicable statutes.

Practice Tip. The guardian ad litem should be familiar with the forms and reports an agency files with the court, including the permanency plan. When this report is written and generated, some sections will contain historical information. Guardians ad litem should familiarize themselves with where that information is found and ask questions of the agency as to what information is the most up to date.

The plan must set forth the type and location of the facility where the child is currently placed and, if a move is being proposed, the nature of the suggested destination. [Wis. Stat.](#) § 48.38(4)(c). If the child is placed more than 60 miles from home, the agency must show that placement within 60 miles of the child's home is unavailable or inappropriate or that this placement more than 60 miles away is in the child's best interest. Placement in a foster home more than 60 miles away is presumed to be in the child's best interest if placement is made pursuant to a voluntary agreement that provides for the placement over 60 miles away and the placement is made to facilitate the anticipative adoptive placement of the child. [Wis. Stat.](#) § 48.38(4)(d). The agency must also explain why the

placement being provided is safe and appropriate for the child. [Wis. Stat. § 48.38\(4\)\(e\)](#). The agency must also include a description of the services that were provided and those considered but not implemented because they were either not available or not safe and appropriate. *Id.*

A voluntary placement agreement for a child to be in a QRFTF with a parent is now an option under [Wis. Stat. § 48.63\(1\)\(bm\)](#). Before such a voluntary placement can occur, a permanency plan must recommend the placement. [Wis. Stat. § 48.38\(4\)\(em\)](#). A child cannot be under a voluntary placement agreement for more than 180 days. [Wis. Stat. § 48.63\(1\)\(bm\)](#).

The plan must describe the services that will be provided to the child, the child's family, the child's foster parent, the operator of the facility where the child is living, or the relative or like-kin individual with whom the child is living. [Wis. Stat. § 48.38\(4\)\(f\)](#), *as amended by 2023 Wis. Act 119* (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). This description should include those services intended to do the following: ensure the child's proper care and treatment; promote safety and stability in the placement; meet the child's physical, emotional, social, educational, and vocational needs; improve the conditions of the parents' home so as to facilitate the child's safe return home; or, if appropriate, services to achieve permanency through guardianship, adoption, permanent placement with a fit and willing relative, or some other planned permanent living arrangement. [Wis. Stat. § 48.38\(4\)\(f\)1.–3.](#) Finally, the plan must set forth the conditions, if any, upon which the child will be returned safely home, including any required changes in the parents' conduct, the child's conduct, or the nature of the home. [Wis. Stat. § 48.38\(4\)\(g\)](#).

If a child is placed in a QRTP, a number of items must be included in the permanency plan beyond what is already required under [Wis. Stat. § 48.38\(4\)](#). These include the following:

1. Documentation of reasonable and good-faith efforts to identify and include all required individuals on the family permanency team.
2. The contact information for the members of the family permanency team.
3. Information showing that meetings of the family permanency team are held at a time and place convenient for the family to the extent possible.
4. If reunification is the child's permanency goal, information demonstrating that the parent from whom the child was removed provided input on the members of the family permanency team or why that input was not obtained.
5. Information showing that the standardized assessment, as determined by the department, was used to determine the appropriateness of the placement in a qualified residential treatment program.
6. The placement preferences of the family permanency team, including a recognition that a child should be placed with his or her siblings unless the court determines that a joint placement would be contrary to the safety or well-being of the child or any of those siblings.
7. If placement preferences of the family permanency team are not the placement recommended by the qualified individual who conducted the standardized assessment, the reasons why these preferences were not recommended.
8. The recommendations of the qualified individual who conducted the standardized assessment, including all of the following:
 - a. Whether the recommended placement in a qualified residential treatment program is the placement that will provide the child with the most effective and appropriate level of care in the least restrictive environment and how that placement is consistent with the short-term and long-term goals for the child, as specified in the permanency plan.
 - b. Whether and why the child's needs can or cannot be met by the child's family or in a foster home. A shortage or lack of foster homes is not an acceptable reason for determining that the child's needs cannot be met in a foster home.
9. Documentation of the approval or disapproval of the placement in a qualified residential treatment program by a court, if such a determination has been made.

[Wis. Stat. § 48.38\(4\)\(k\)](#).

Note. The guardian ad litem should review the section of a permanency plan concerning placement in a QRTP to ensure that remaining in a QRTP is in a child's best interest.

The permanency plan must also include additional information if a child is a parent or is pregnant. In such cases, the guardian ad litem for the child-parent or for a pregnant child should review the caseworker's or social worker's report for the list of services or programs for the child-parent or pregnant child to prepare them for parenthood or support them as a parent. The permanency plan must also address the out-of-home-care prevention strategy for any child born to the "parenting or pregnant child." [Wis. Stat. § 48.38\(4\)\(L\)](#).

Each time a child's placement is changed under a consent decree or a revision to a consent decree, under a dispositional order or a revision or an extension to a dispositional order, or under a trial reunification order, the agency that prepared the permanency plan must revise the plan to conform to the order and file a copy of the revised plan with the court. Each plan filed must be made a part of the court order. [Wis. Stat. § 48.355\(2e\)\(b\)](#).

3. Permanency Review [§ 4.41]

Six months after the date that the child was first removed from the home, there must be a permanency review. [Wis. Stat. § 48.38\(5\)\(a\)](#); cf. [Wis. Stat. § 48.63\(5\)\(d\)](#) (describing separate review requirements for certain children in group homes who are custodial parents or expectant mothers). Additional permanency reviews are also generally required every six months after a previous review for as long as the child is placed outside the home. [Wis. Stat. § 48.38\(5\)\(a\)](#). The permanency plan may be reviewed by the court or by a panel of three persons designated by an independent agency or by the agency that prepared the plan. [Wis. Stat. § 48.38\(5\)\(ag\)](#). Two of the three panel members must be persons who are not employed by the agency that prepared the plan and who are not responsible for providing services to the child or the child's family. *Id.* Notification of the review must be given to the child; the child's parent, guardian, and legal custodian; the child's foster parent, the operator of the facility in which the child is living, or the relative or like-kin individual with whom the child is living; and, if the child is an Indian child who is placed outside the home, the child's Indian custodian and tribe. [Wis. Stat. § 48.38\(5\)\(b\)](#), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). The notice must include the time, place, and purpose of the review; the issues to be determined; and the fact that these persons have a right to be heard at the review, by submitting written comments not less than 10 working days before the review or by participating in the review. *Id.* Notification must also be given to the person representing the interests of the public, the child's counsel, the child's guardian ad litem, the child's school, and the child's court-appointed special advocate. *Id.* That notice must contain the time, place, and purpose of the review, the issues to be determined (and, for the child's school, the name and contact information for the caseworker or social worker assigned to the child's case), and that the persons receiving notice may have an opportunity to be heard at the review by submitting written comments relative to the determinations not less than 10 working days before the review. *Id.*; [Wis. Stat. § 48.38\(5\)\(bm\)1](#). Notice for this permanency review must be in writing not less than 30 days before the review. [Wis. Stat. § 48.38\(5\)\(b\)](#).

Note. The guardian ad litem does not have a right to be heard at the review, but may be heard as provided in [Wis. Stat. § 48.38\(5\)\(bm\)1](#).

If a child is placed in a QRTP, the caseworker must provide additional information for the court or the review panel to find that the placement is appropriate and necessary for the child's continued safety. This information must show whether ongoing assessment of the child's strengths and needs supports a continued placement in a QRTP, whether the QRTP placement is the most effective placement in the least restrictive environment, the specific treatment the child is receiving and the expected length of time for the treatment, and the efforts made to prepare the child to return home or be placed with a relative, a guardian, or an adoptive parent or in a foster home. [Wis. Stat. § 48.38\(5\)\(bm\)4](#).

At the review of a permanency plan under [Wis. Stat. § 48.38\(5\)](#), the panel or the court must make several determinations. Under [Wis. Stat. § 48.38\(5\)\(c\)1.-3.](#), the panel or court must determine the continuing necessity for and the appropriateness of the placement; the extent to which the agency, any other service providers, the parents, the child, and the child's guardian, if any, have complied with the plan; and, in planning to meet the special needs of the child and the child's parents, the extent of any efforts to involve appropriate service providers in addition to the agency staff. The panel or the court must also determine the progress that has been made toward eliminating the causes for the child's placement outside the home, and progress toward either returning the child safely home or achieving another form of permanency. [Wis. Stat. § 48.38\(5\)\(c\)4](#). The court or panel must also establish the date by which it is likely that the child will be returned home, placed for adoption, placed with a guardian, placed with a fit and willing relative, or placed in "some other planned permanent living arrangement that includes an appropriate, enduring relationship with an adult." [Wis. Stat. § 48.38\(5\)\(c\)5](#).

If the child has been placed outside the home, in a foster home, group home, nonsecured residential care center for children and youth, or shelter care facility, for 15 of the most recent 22 months (not including any period during which the child was a runaway from the out-of-home placement or residing in a trial reunification home), the panel or the court must consider whether the permanency plan is still appropriate and must ascertain the circumstances that prevent the child from being safely returned home or from achieving another form of permanency. [Wis. Stat.](#) § 48.38(5)(c)6. The panel or court must also determine whether the responsible agency has made reasonable efforts to achieve the permanency goal of the permanency plan, including, if appropriate, through an out-of-state placement. [Wis. Stat.](#) §§ 48.38(5)(c)7., 48.355(2c), (2d)(b)1.–5.; *see also supra* § 4.28 (reasonable efforts standard). Wisconsin's DCF is charged with promulgating rules for the reasonable efforts standard. *See* [Wis. Stat.](#) §§ 48.355(2c), 48.38(6)(c).

If the permanency goal of the child's permanency plan is placement of the child in a planned permanent living arrangement, the court or panel must determine the steps taken by the agency, including consultation with the child, to ascertain whether the child has regular, ongoing opportunities to engage in age-appropriate or developmentally appropriate activities and to ensure that the child's caregiver is applying the reasonable and prudent parent standard to decisions concerning the child's participation in those activities. [Wis. Stat.](#) § 48.38(5)(c); *see also* [Wis. Stat.](#) §§ 48.02(14r) (defining "reasonable and prudent parent standard"), 48.383 (explaining when out-of-home care providers must use reasonable and prudent parent standard).

If a child's siblings have also been removed from the home, the court or panel must determine whether the agency has made reasonable efforts for the child and sibling group to remain in a placement together. [Wis. Stat.](#) § 48.38(5)(c)8.; *see also* [Wis. Stat.](#) § 48.38(4)(br)1. (defining "sibling"). To the extent that the court or panel determines that a joint placement would be contrary to the safety or well-being of the child or any of those siblings, the court or panel must determine whether the agency made reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and those siblings, unless the court or panel determines that such visitation or interaction would be contrary to the child's or any sibling's safety or well-being. [Wis. Stat.](#) § 48.38(5)(c)8.

For out-of-home placement of Indian children, the court or panel must determine whether active efforts, in accord with WICWA's requirements in [Wis. Stat.](#) § 48.028(4)(d)2., were made to prevent the breakup of the Indian child's family and whether those efforts have proved unsuccessful. The court or panel must also determine whether the Indian child's placement is in compliance with the WICWA order of placement preferences under [Wis. Stat.](#) § 48.028(7); and if the placement is not in compliance with that order of preferences, whether there is good cause to depart from the preferences. [Wis. Stat.](#) § 48.38(5)(c)8m.

Practice Tip. Good cause to depart from placement preferences should be a decision primarily made by the tribe and supplemented by information from the parties. A typical reason to depart from the placement preferences under WICWA is that the child has a high level of need for treatment foster care, for which there are no tribal homes available.

Note. There are other findings that need to be made for a child's dispositional order under [Wis. Stat.](#) § 48.355(4)(b)4. (extending out-of-home care for young adults with an IEP), but in those cases there will not be a guardian ad litem appointment under [Wis. Stat.](#) § 48.235(1)(e).

Within 30 days after the review, the agency must prepare a written summary of its determinations and provide a copy to the court; the child or the child's counsel or guardian ad litem; the person representing the interests of the public; the child's parent, guardian, or legal custodian; the child's court-appointed special advocate; the child's foster parent, operator of the facility where the child is living, or relative or like-kin with whom the child is living; or, if the child is an Indian child placed outside the home, the child's Indian custodian or tribe. [Wis. Stat.](#) § 48.38(5)(e), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). If the summary indicates that a review panel made recommendations that conflict with the child's dispositional order or that provide for additional services not specified in the dispositional order, the agency primarily responsible for providing services to the child must request the revision of the dispositional order. [Wis. Stat.](#) § 48.38(5)(f).

4. Permanency Hearing [§ 4.42]

Permanency reviews and permanency hearings are similar in purpose and nature. In fact, some Wisconsin counties have permanency hearings only every six months and do not conduct reviews. The notice provisions for permanency hearings differ slightly from those for the permanency review. At least 30 days before the date of the permanency hearing, the court must notify the

child; the child's parent, guardian, and legal custodian; and the child's foster parent, the operator of the facility in which the child is living, or the relative or like-kin individual with whom the child is living of the time, place, and purpose of the hearing, of the issues to be determined at the hearing, and of the fact that they have a right to be heard at the hearing. The court must also notify the child's counsel, the child's guardian ad litem, the child's court-appointed special advocate; the agency that prepared the permanency plan; the person representing the interests of the public; the child's school; and, if the child is an Indian child who is placed outside the home of the Indian child's parent or Indian custodian, the Indian child's Indian custodian and tribe of the time, place, and purpose of the hearing, of the issues to be determined at the hearing, and of the fact that they may have an opportunity to be heard at the hearing. [Wis. Stat.](#) § 48.38(5m)(b), *as amended by 2023 Wis. Act 119* (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

A child, parent, guardian, legal custodian, foster parent, operator of a facility, or relative or like-kin individual who is provided notice of the hearing has a right to be heard at the hearing by submitting relevant written comments at least 10 working days before the date of the hearing or by participating at the hearing. A counsel, guardian ad litem, court-appointed special advocate, agency, child's school, or person representing the interests of the public who is provided notice of the hearing may have an opportunity to be heard at the hearing by submitting relevant written comments at least 10 working days before the date of the hearing or by participating at the hearing. A foster parent, operator of a facility, relative, or like-kin individual who receives notice of a hearing and has a right to be heard does not become a party to the proceeding on which the hearing is held solely on the basis of receiving that notice and right to be heard. [Wis. Stat.](#) § 48.38(5m)(c), *as amended by 2023 Wis. Act 119* (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

The court must consult with the child regarding the child's permanency plan and any other matters the court finds appropriate if the court determines that consultation with the child would be in the best interests of the child, or if the child's permanency plan includes a statement under [Wis. Stat.](#) § 48.38(4)(i) indicating that the child's age and developmental level are sufficient for the court to consult with the child. [Wis. Stat.](#) § 48.38(5m)(c)2. If none of those circumstances apply, the court may permit the child's caseworker, the child's counsel, or the child's guardian ad litem to make a written or oral statement during the hearing, or to submit a written statement before the hearing, expressing the child's wishes, goals, and concerns regarding the permanency plan and other matters the court finds appropriate. If the court permits a written or oral statement to be made or submitted, the court may nonetheless require the child to be physically present at the hearing. *Id.*

If the permanency goal of the child's permanency plan is placement of the child in some other planned permanent living arrangement, the agency that prepared the permanency plan must present to the court specific information showing that intensive and ongoing efforts were made by the agency, including searching social media, to achieve permanency in another manner, and why those efforts were not successful. The agency also must present specific information showing the steps it has taken, including consultation with the child, to ascertain whether the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities, as well as to ensure that the child's caregiver is applying the reasonable and prudent parent standard to decisions concerning the child's participation in those activities. In addition, at the hearing the court must consult with the child about the permanency outcome desired by the child. [Wis. Stat.](#) § 48.38(5m)(c)3.

Similar to a permanency review, at a permanency hearing, if a child is placed in a QRTP, the caseworker must provide additional information for the court to find that the placement is appropriate and necessary for continued safety of the child. This information must show whether ongoing assessment of the child's strengths and needs supports a continued placement in a QRTP, whether the QRTP placement is the most effective placement in the least restrictive environment, the specific treatment the child is receiving and the expected length of time for the treatment, and the efforts made to prepare the child to return home or be placed with a relative or like-kin individual or in a foster home. [Wis. Stat.](#) § 48.38(5m)(c)4.

At least five days before the hearing, the agency creating the plan must distribute the plan and any comments to the court, to the child's parent, guardian, and legal custodian, to the person representing the interests of the public, to the child's counsel or guardian ad litem, to the child's court-appointed special advocate, and, if the child is an Indian child who is placed outside the home of the Indian child's parent or Indian custodian, to the Indian child's Indian custodian and tribe. [Wis. Stat.](#) § 48.38(5m)(d). The court must make findings in a permanency hearing on a case-by-case basis according to the specific information for each child, and then must make a written order. [Wis. Stat.](#) § 48.38(5m)(e).

Practice Tip. The guardian ad litem assesses whether the plan's proposed permanency goal, and concurrent permanency goal, if any, is in the child's best interest. If the child will be present at the hearing, the guardian ad litem should prepare the child as to how the hearing will proceed, who will be present, and what opportunity the child will have to express the child's own wishes to the court about the proposed plan. If the child will not be present, the guardian ad litem should be ready to inform the court why

the child is not present, when the guardian ad litem last met with the child, and what the child's opinion is about the proposed plan. Whereas one judge may prefer that the child attend school or other beneficial activities instead of being present in court, another judge may seek to actively engage children of any age in expressing their placement preferences at court hearings. Sources on promoting effective and qualitative permanency hearings include CCIP's training materials <https://www.wicourts.gov/courts/offices/ccip.htm> (updated May 13, 2024). The website provides links to CCIP's judicial checklist, <https://www.wicourts.gov/courts/programs/docs/permanency2.pdf> (Mar. 2021).

N. Miscellaneous Provisions [§ 4.43]

1. Procedure at Hearings [§ 4.44]

Wis. Stat. § 48.299 sets forth the procedures for hearings under the Children's Code. The general public is excluded from these hearings because of the confidential nature of juvenile court proceedings, unless a public fact-finding hearing is demanded by a child through the child's counsel, by an expectant mother through her counsel, or by the unborn child's guardian ad litem. Wis. Stat. § 48.299(1)(a). The court must refuse to grant the public hearing if a parent, a guardian, an expectant mother, or the unborn child's guardian ad litem objects. *Id.* If a public hearing is not held, only the parties, their counsel or guardians ad litem, the child's court-appointed special advocate, the child's foster parent or other physical custodian, witnesses, and persons requested by a party and approved by the court may be present. Wis. Stat. § 48.299(1)(ag). The court may exclude a foster parent or other physical custodian from portions of the hearing if those portions deal with sensitive personal information, or if the court determines that the exclusion would be in the child's best interests. *Id.* The court may also admit any other person the court finds to have a proper interest in the case or in the court's work, including a member of the bar or a person engaged in the bona fide research, monitoring, or evaluation of activities conducted under 42 U.S.C. § 629h (relating to foster care and adoption), as determined by the director of state courts. *Id.* Anyone who divulges information that would identify the child, the expectant mother of an unborn child, or the family involved in any proceeding under the Children's Code is subject to proceedings under Wis. Stat. ch. 785 (contempt of court). Wis. Stat. § 48.299(1)(b).

The court may temporarily exclude a child from a hearing if the court finds that it is in the child's best interest to be excluded and if the child's counsel or guardian ad litem consents. Wis. Stat. § 48.299(3). The court may exclude a child under the age of seven from the entire hearing if the court finds that the child is too young to comprehend the hearing and further finds that it is in the child's best interest to be excluded. *Id.* In practice, the child is almost always excluded from hearings. The guardian ad litem should inform the parents or substitute-care provider and the child in advance that the child need not appear, so that the child may attend school or daycare and not be unduly stressed by having to appear in court.

Wis. Stat. § 48.299(4)(a) dictates that the presentation of evidence at the fact-finding hearings under Wis. Stat. §§ 48.31 (CHIPS and UCHIPS) and 48.42 (TPR) is governed by Wis. Stat. chs. 901–911, the Wisconsin Rules of Evidence. Neither common law nor statutory rules of evidence are binding at hearings specified in Wis. Stat. § 48.299(4)(b), such as dispositional hearings or at hearings on change in placement, revision of a dispositional order, or extension of a dispositional order. Wis. Stat. § 48.299(4)(b). At such hearings, all testimony having reasonable probative value will be admitted, and any testimony that is immaterial, irrelevant, or unduly repetitious will be excluded. *Id.* Hearsay evidence may be admitted if it has demonstrable circumstantial guarantees of trustworthiness. *Id.* The court must give effect to the rules of privilege recognized by law and will apply the basic principles of relevance, materiality, and probative value to proof of all questions of fact. *Id.* Objections to evidentiary offers and offers of proof of evidence not admitted may be made and must be noted in the record. *Id.*

Although the rules of evidence for some juvenile court hearings differ somewhat from those for hearings under other chapters of the Wisconsin Statutes, the guardian ad litem should be competent and experienced in courtroom procedure. The guardian ad litem can participate and present evidence through witnesses, as can any party, but the guardian ad litem cannot act as a witness. The guardian ad litem should always keep in mind that the guardian ad litem is an attorney, whose role is to look at the evidence and make a recommendation to the court for what is in the best interests of the child. In determining how to proceed, the guardian ad litem should always follow the course that would be appropriate for an attorney in any other proceeding. For example, the guardian ad litem should never expect that a report or recommendation submitted to the court would be admissible as evidence. The guardian ad litem is not a witness; therefore, anything the guardian ad litem produces is not evidence.

Practice Tip. To communicate a position to the court in writing, the guardian ad litem should submit a formal brief or letter brief. The guardian ad litem does not make a report that sets forth facts not otherwise of record but takes a position with respect to the

child's or unborn child's best interest based on the facts and circumstances of the case that are or will properly be before the court. The guardian ad litem should also avoid ex parte communication with the court. At all times, the guardian ad litem must keep in mind that the guardian ad litem is representing the legal best interests of the child or unborn child because the guardian ad litem is an attorney, competent to practice law in the juvenile court. According to [Wis. Stat.](#) § 48.235(3)(a), the guardian ad litem is to be an advocate for the best interests of the person or unborn child for whom the appointment is made and is to function independently, in the same manner as an attorney for a party to the action.

2. Involuntary Removal of the Child or the Expectant Mother of an Unborn Child [§ 4.45]

[Wis. Stat.](#) § 48.305 requires adherence to the statutory time periods if a child is removed from the physical custody of the child's parent or guardian without the consent of the parent or guardian, or when an adult expectant mother of an unborn child is held in custody pursuant to [Wis. Stat.](#) § 48.193(1)(c) or (d)2. without the consent of the expectant mother. If the parent, guardian, or adult expectant mother requests, the plea hearing and the fact-finding hearing must be scheduled within 30 days after a request from the parent or guardian from whom custody was removed or from the adult expectant mother who was taken into custody. [Wis. Stat.](#) § 48.305. *But see* [Wis. Stat.](#) § 48.299(9) (time periods for Indian child). These hearings may be combined, and the time period may be extended only with the consent of the requesting parent, guardian, or expectant mother. [Wis. Stat.](#) § 48.305. The good-cause alternative under [Wis. Stat.](#) § 48.315 does not operate to extend this deadline.

3. Jeopardy [§ 4.46]

[Wis. Stat.](#) § 48.317(1) provides that in a trial to the court, *jeopardy* attaches when a witness is sworn. If the trial is to a jury, jeopardy attaches when the jury selection is completed and the jury sworn. [Wis. Stat.](#) § 48.317(2). Because the delinquency provisions were moved from [Wis. Stat.](#) ch. 48 to ch. 938 when the Juvenile Justice Code was created in 1996, jeopardy in CHIPS and UCHIPS cases means the right of the petitioner to pursue the allegations in the petition.

4. Supervised Independent Living [§ 4.47]

Supervised independent living, a dispositional alternative provided under [Wis. Stat.](#) § 48.345(10)(a), permits the judge to order that a child who is 17 years of age be allowed to live independently, either alone or with friends, under such supervision as the judge deems appropriate. A plan for independent living may be accomplished with or without the consent of the parent or guardian. [Wis. Stat.](#) § 48.345(10)(b). The judge may order independent living only upon a showing that the child is of sufficient maturity and judgment to live independently and upon proof of a reasonable plan for supervision by an appropriate person or agency. [Wis. Stat.](#) § 48.345(10)(c).

5. Visitation [§ 4.48]

The only provision for visitation in CHIPS cases is set forth in [Wis. Stat.](#) § 48.355(3). The standard is the best interests of the child. This provision differs from the physical placement provision in [Wis. Stat.](#) § 767.41(4)(b) of the Family Code, which permits the denial of placement with a parent only when placement would endanger the child. Thus, a parent is entitled to some placement under the Family Code unless placement with the parent would endanger the child. No similar right is accorded to parents in CHIPS cases. The Children's Code places the burden of showing that visitation would be in the child's best interests on the parent seeking visitation.

Caution. In a case in which one of the permanency goals is reunification, a parent should not suspend visitation without a court order. Otherwise, the suspension of visits can create a situation in which it might not be possible to prove reasonable efforts to achieve the goals of the permanency plan at the next permanency hearing. Best practice is to have a court order to suspend visitation with clear conditions included on what must be done for visitation to resume.

6. Medical Authorization [§ 4.49]

Under [Wis. Stat.](#) § 48.373, the court may authorize medical services, including surgical procedures, when needed. The court must determine that reasonable cause exists for the services and that the child is within the court's jurisdiction and consents to the medical services.

7. Custody of Children [§ 4.50]

[Wis. Stat.](#) § 48.435 automatically grants legal custody to the mother of a nonmarital child. The court may, however, grant legal custody to another person or transfer legal custody to an agency, if appropriate.

Practice Tip. It is possible to have a dispositional order in place with a father not being adjudicated but acting as the biological father. Under [Wis. Stat.](#) § 48.435, he has no legal custody to the child. The dispositional order can provide him shared legal custody with the mother so that he may participate in the child's life before his adjudication.

8. Indian Child Welfare Act [§ 4.51]

WICWA is the Wisconsin version of the federal ICWA, as codified in the Wisconsin Statutes. *See* 2009 Wis. Act 94. WICWA applies to any Indian child custody proceeding in which the following may occur: an adoptive placement, an out-of-home care placement, a preadoptive placement, a termination of parental rights, or a delegation of parental power. [Wis. Stat.](#) § 48.028(2)(d), (3) (a). An out-of-home placement includes a temporary placement in a foster home, a group home, a residential care center for children and youth, a shelter care facility, a relative's home, the home of like-kin, or a guardian's home, where the child's parent cannot have the child returned upon demand. [Wis. Stat.](#) § 48.028(2)(e), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). ICWA, 25 [U.S.C.](#) §§ 1901–1963, supersedes the provisions of the Wisconsin Statutes in any child custody proceeding governed by ICWA, except that in any case in which [Wis. Stat.](#) ch. 48 provides a higher standard of protection for the rights of an Indian child's parent or Indian custodian than the rights provided under ICWA, the court must apply the standard under [Wis. Stat.](#) ch. 48. *See* [Wis. Stat.](#) § 48.028(10); *I.P. v. State (In the Int. of D.S.P.)*, 166 Wis. 2d 464, 473, 480 N.W.2d 234 (1992). Whenever an Indian child is the subject of [Wis. Stat.](#) ch. 48 proceedings, ICWA and WICWA must be reviewed and complied with. *See* [Wis. Stat.](#) § 48.01(2). Both acts seek to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. In recognition of those goals, the guardian ad litem should bear in mind that it is in the best interests of Indian children to have relationships with their tribes.

Note. Under WICWA, the definition of “like-kin” is expanded to include individuals identified by the child's tribe according to “tribal tradition, custom or resolution, code, or law.” [Wis. Stat.](#) § 48.02(12c), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

ICWA and WICWA apply to an Indian child when the tribe in which the Indian child is a member or is eligible for membership is recognized by the U.S. government (i.e., a tribe that is federally recognized). [Wis. Stat.](#) § 48.02(8r). Only the child's tribe can determine whether the child is or is not a member of or eligible for membership in the tribe. Criteria for membership vary from tribe to tribe and may require a certain blood quantum or documentation of descent.

Certain notifications must be made in any involuntary proceeding involving the out-of-home care placement of, termination of parental rights to, or delegation of powers regarding a child whom the court knows or has reason to know is an Indian child. For the first hearing of the proceeding, the party seeking the out-of-home care placement, termination of parental rights, or delegation of powers must notify the Indian child's parent, Indian custodian, and tribe, by registered mail, return receipt requested, of the pending proceeding and of their right to intervene in the proceeding and must file the return receipt with the court. [Wis. Stat.](#) § 48.028(4)(a); *see also infra* § 4.87 (discussing delegation of power by parent).

Practice Tip. A guardian ad litem who files the action must make certain to comply with the notice requirements of [Wis. Stat.](#) § 48.028(4)(a).

The guardian ad litem must ascertain whether the child's tribe has established placement preferences, and those preferences, if any, must be followed if the placement is in the least restrictive setting that most approximates a family, appropriate to the child's special needs, and within reasonable proximity to the Indian child's home. [Wis. Stat.](#) § 48.028(7)(c). It is beneficial for the guardian ad litem to maintain awareness of the priorities of tribal and child protection workers, who often work together in case planning, conducting home visits, and securing placements. Good cause may be found to justify a departure from the tribal placement preferences, and the burden of establishing good cause to so depart is on the party requesting that departure. [Wis. Stat.](#) § 48.028(7)(e).

Two key findings are required to remove an Indian child from the child's home. These findings relate to the severity of physical or emotional damage to the child and the degree to which efforts were made to prevent removal. [Wis. Stat. § 48.028\(4\)\(d\)](#). First, the court or jury must find by clear and convincing evidence, including the testimony by one or more qualified expert witnesses as defined in [Wis. Stat. § 48.028\(1\)\(g\)](#), that continued custody of the Indian child by the parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child. [Wis. Stat. § 48.028\(4\)\(d\)](#); *see also* [Wis. Stat. § 48.028\(4\)\(e\)](#) (requiring that likelihood of "serious emotional or physical damage" must be proved "beyond a reasonable doubt" in termination of parental rights cases involving Indian children). Second, the court or jury must find, by clear and convincing evidence, that "active efforts" were made to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. [Wis. Stat. § 48.028\(4\)\(d\)](#). Whereas the term "active efforts" was created in ICWA in 1978, *see* 25 [U.S.C. § 1912](#), the term "reasonable efforts" was created in the federal Adoption Assistance and Child Welfare Act of 1980, *see* 42 [U.S.C. § 671](#). Some courts have taken the view that "active" efforts is a higher standard than "reasonable" efforts. *See In re Nicole B.*, [927 A.2d 1194](#), 1206 (Md. Ct. Spec. App. 2007), *rev'd on other grounds*, [976 A.2d 1039](#), 1042 & n.1 (Md. 2009). In Wisconsin, "active efforts" generally connotes a cultural emphasis on the assessment, services, and other aspects of the case work. *See* [Wis. Stat. § 48.028\(4\)\(g\)](#). These findings are required for an out-of-home consent decree or an out-of-home dispositional order. While the findings can be made for a temporary physical custody hearing, they are not required. *See* [Wis. Stat. § 48.21](#). For a permanency review, the court must make active efforts and comply with the placement preferences under WICWA. [Wis. Stat. § 48.38\(5\)\(c\)8m](#).

Practice Tip. The guardian ad litem should be familiar with the different factors that make up a finding of active efforts. These are listed on the statement of active efforts form provided by the circuit court and completed by the agency handling the case. *See* Form [IW-1609](#).

Comment. The guardian ad litem has a role in developing the record to assist the court in making findings on serious damage and active efforts to ensure that CHIPS orders contain detailed and child-specific information, even when all parties agree with the disposition and placement determination.

For further information, the guardian ad litem should review the following sources: Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act*, <https://narf.org/nill/documents/icwa> (last visited Sept. 24, 2024); Wis. DCF, *Wisconsin Indian Child Welfare Act (WICWA)*, <https://dcf.wisconsin.gov/wicwa> (last visited Sept. 24, 2024); Child Welfare Info. Gateway, *The Indian Child Welfare Act: A Primer for Child Welfare Professionals* (Apr. 2021), <https://www.childwelfare.gov/resources/indian-child-welfare-act-primer-child-welfare-professionals/>.

O. Children with Special Needs [§ 4.52]

1. Jurisdiction [§ 4.53]

a. Voluntary Petition for Services [§ 4.54]

[Wis. Stat. § 48.13](#) allows the parents of children with special needs to petition the court for help. [Wis. Stat. § 48.13\(4\)](#) is used when a child's needs have become too great for the parent to handle at home and placement in an alternative setting is necessary. In some cases, court intervention or a court-ordered placement under this section may be necessary before the county agency can pay for certain in-home services, such as wrap-around services (i.e., family support services designated by a care coordinator, such as multiple service-provider coordination, transportation assistance, and assistance with finding financial resources for care), respite care, or daycare for younger children.

For children with special needs, the guardian ad litem should ensure that all voluntary services have been considered before going to court, especially services that may come through an agency serving people with emotional or developmental disabilities. It is important to determine whether the schools have provided all the services for which they are responsible under the special education laws. A review of a child's IEP, if available, is appropriate, or, if the child might qualify for an IEP but has not been evaluated, a request for an evaluation should be explored. Such determination may require parallel actions in juvenile court and under the special education laws.

b. Involuntary Petition for Services [§ 4.55]

If a child is in need of special treatment or care, which the child's guardian is unable to provide or needs assistance in providing, but the guardian is unwilling or unable to sign a CHIPS petition, the court may acquire CHIPS jurisdiction under [Wis. Stat. § 48.13\(4m\)](#).

c. Abuse and Neglect [§ 4.56]

Unfortunately, many children with special needs come into the court system because they have been abused or neglected by their parents. Sometimes the abuse or neglect has caused the child's disability. Other times, the stress of dealing with the child's impairment may have contributed to the parents' actions. Of course, there are also situations in which there seems to be no connection between the parents' conduct and the child's condition. For further information on the effects of abuse and neglect, see [chapter 2, supra](#); for further information on the nature of mental disabilities, see [chapter 5, infra](#).

School arrangements may also be crucial. If the child is placed outside the original school district, that district is no longer responsible for the child's educational program. For a child enrolled in special education, that may mean the temporary loss of services, including occupational therapy, speech therapy, physical therapy, psychological counseling, and particularized educational programs.

Note. There has been a push in Congress to ensure that children in out-of-home placements maintain educational stability. The Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015), was enacted in December 2015, with provisions for educational stability of children in foster care becoming effective in December 2016, with the main purpose of promoting increased collaboration between schools and child welfare agencies. There are now required memorandums of understanding between these entities to make determinations on where children should go to school based on what is in their best interest, even if it is not a school in the district in which their new foster home is located. For more information, the guardian ad litem can review Wisconsin Department of Public Instruction, *The Elementary and Secondary Education Act*, <https://dpi.wi.gov/esea> (last visited Oct. 9, 2024), and U.S. Department of Education, *Every Student Succeeds Act (ESSA)*, <https://www.everystudentsucceedsact.org/> (last visited Oct. 9, 2024).

The receiving school district might hesitate to take responsibility for a child who needs an extensive program. Ultimately, the new district has little choice but to provide the program, yet it may take a while to get it to do so. Sometimes arrangements may be made for transporting the child back to the home district. Other times, especially when the stay in foster care is likely to be lengthy, the guardian ad litem and other advocates for the child will have to make every effort to ensure that the new school program is appropriate and starts quickly.

In addition, the child's foster parents may need support services so that they will be able to care for the child. Such services include respite, counseling, a health aide, or even homemaker assistance. The foster parents themselves may need some training on how to work with a child who has unusual or extensive disabilities. For further discussion of long-term support services in Wisconsin and sources of information about service providers for people with mental disabilities, see [chapter 5](#) and [appendix 5B, infra](#).

In an effort to promote normalcy for children, the legislature and the DCF have provided authority for foster parents to make decisions for children in their care. Care providers can allow children in their placement to participate in age-appropriate or developmentally appropriate extracurricular, enrichment, cultural, and social activities. To protect parents' rights, there are some limitations to this decision-making authority. See [Wis. Stat. § 48.383](#); [Wis. Admin. Code](#) ch. DCF 56; Wis. DCF, *Reasonable and Prudent Parent Standard* (Feb. 2024), <https://dcf.wisconsin.gov/files/publications/pdf/5105.pdf>.

The long-range issues presented by these cases arise when the court chooses the dispositional plan. The guardian ad litem should make sure that the child's treatment needs are not forgotten as the court tries to deal with the often difficult task of responding to the parents' conduct.

d. Wis. Stat. § 48.13(9) [§ 4.57]

Cases in which an older child with a serious treatment need must use court intervention to get help that the child's parents refuse to provide are dealt with under [Wis. Stat. § 48.13\(9\)](#). Cases brought under this section are relatively rare, but when they occur, the reason the parent refuses to help the child is often related to the child's disability. According to the Wisconsin Jury Instructions—Children, *special treatment or care* is defined as “professional services which need to be provided to (child) or (child's) family to

protect the well-being of (child), to prevent placement of the child outside of the home or to meet the special needs of (child).” [Wis. JI—Children 233](#). This care can include medical, psychological, psychiatric, or alcohol and other drug abuse treatment. *Id.* Further, the jury instruction committee intended that there be some reasonable effort by a parent before obtaining jurisdiction by claiming an “inability” to provide special treatment or care. *Id.* cmt.

2. Disposition [§ 4.58]

a. In General [§ 4.59]

The Children’s Code specifically gives the court the power to order services directed toward a child’s special needs. See [Wis. Stat.](#) §§ 48.345, 48.355. When the child has a serious disability, the challenge to the court may be to decide what services to order. Three factors affect the court’s power to design useful plans to help children with special needs: evaluation, coordination, and resources. Given the potential prejudice in favor of institutional placements for children who are disabled, the guardian ad litem should consider all possible alternative dispositions that would benefit the child. For further information on the institutional bias and on alternatives to institutional placement for people with mental disabilities, see [chapter 5](#), *infra*.

The requirements for placements of children in QRTPs directly affect children in the child protection system who have special needs. As stated in [chapter 5](#), *infra*, traditionally the first placement explored for children with special needs is in an institutional setting. As institutional settings around the state become certified under [Wis. Stat.](#) § 48.675, those placements must focus on treating a child with the intention of returning the child home. The certification requirements also help to ensure that children receive services that are based in trauma-informed care, that the services include aftercare, and that families are involved in treatment planning. See DCF, *QRTP Certification Requirements*, <https://dcf.wisconsin.gov/files/familyfirst/qrtip-certification-grid-august-2021.pdf> (last visited Sept. 24, 2024).

b. Evaluation [§ 4.60]

Every CHIPS case requires adequate and appropriate evaluation of the situation. In the majority of situations, the needs of the children and families are primarily behavioral and emotional. The professionals the court usually relies on when it evaluates neglect or abuse have training to evaluate situations, but the guardian ad litem might have different insight based on prior work under [Wis. Stat.](#) ch. 48. The guardian ad litem can assist in offering suggestions and knowledge about different alternatives for case evaluation. This evaluation not only should provide a clearer picture of the nature and degree of the child’s impairments, but also should describe reasonable methods for assisting the child and set forth functional outcomes to be adopted as treatment objectives. For further information on desirable evaluations of people with mental disabilities and obtaining those evaluations, see [chapter 5](#), *infra*.

c. Coordination [§ 4.61]

The child’s court-ordered disposition must be coordinated with other services the child might be receiving. Interagency coordination is especially important. Although the court cannot control outside agencies, such as the schools, the court order can describe an integrated picture of the services the child will receive. The order may direct the agency implementing the court plan to make sure that services are coordinated among all providers. This also includes coordination of services for parents. Some parents can be subject to a dispositional order as well as criminal probation conditions. The guardian ad litem should ensure that the agency is not having parents duplicate services to fulfill different court orders.

d. Resources [§ 4.62]

A court order will benefit the child only if there is someone or some organization available and willing to implement it. If a child coming before the court has unique needs, chances are there will be no service provider in the community who can easily plug the child into an ongoing program. There may be some help for the child, however; a person or an agency from another jurisdiction, serving a child with similar needs, may be presented to the court as a model. The order may instruct the local responsible agency to initiate or contract for the initiation of a similar service locally. The court may also order the department of community programs under [Wis. Stat.](#) §§ 51.42 and 51.437 to provide appropriate services. For further information on service providers for people with mental disabilities and on departments of community programs, see [chapter 5](#), *infra*.

e. Alternatives to Institutional Placement [§ 4.63]

Traditionally, the first choice for care outside the home for children with severe disabilities used to be a residential care institution. *See infra* [ch. 5](#) (adults with mental disabilities). But today, more and more counties recruit and train foster parents, or work with treatment foster care agencies, that specialize in the care of children with significant mental, emotional, or physical disabilities. These foster homes and agencies, in conjunction with improved educational programs, permit many more children to stay in the community. Sometimes, the foster homes serve as supports to the child's birth family. As a result, the child spends significant periods of time in both homes and, in effect, is co-parented.

A child who is subject to [Wis. Stat.](#) ch. 48 jurisdiction, may also be in need of services or placements under [Wis. Stat.](#) chs. 51 and 55. *See infra* [chs. 7](#) ([Wis. Stat.](#) ch. 55 placements), [8](#) ([Wis. Stat.](#) ch. 51 placements).

Placements to residential treatment centers however, must be made by the court under [Wis. Stat.](#) ch. 48. In considering a proposed residential treatment placement, the guardian ad litem should ask whether the placement is being suggested because there is nowhere else the child can live or because it might help achieve certain treatment objectives. If a residential treatment placement is being recommended, the court report must indicate why a less restrictive placement is not appropriate. The report must also describe the purposes and objectives of the placement. If the objectives are primarily to ensure that the child has a placement, it is appropriate to state what is being done to develop less restrictive alternatives and to set forth the timetable for such development. *See* [Wis. Stat.](#) §§ 48.33(1)(b), 48.355(1), (2c)(a)5.

If the proposed residential placement is for treatment, the report to the court should describe the nature and goals of the treatment. The court report should also indicate how long it will take to meet the treatment goals. The report should describe an objective measure for determining when these goals have been accomplished so that the child's residential placement for treatment does not become permanent. If the facility cannot meet the treatment objectives, an alternative residential treatment program should be investigated. Having the child spend time in a program that does not work is counterproductive and may be very harmful.

P. Voluntary Petition for Services [§ 4.64]

The ground for jurisdiction under [Wis. Stat.](#) § 48.13(14) allows for another type of voluntary petition for a parent to sign to request jurisdiction of the court. Whereas [Wis. Stat.](#) § 48.13(4) focuses on services for a child in need of special treatment or care that a parent is unable to provide without assistance, the voluntary jurisdiction under [Wis. Stat.](#) § 48.13(14) focuses on a parent who is receiving treatment for substance-abuse issues at a QRFTF and wishes to have the child placed in that facility with the parent. The guardian ad litem should make sure that the QRFTF meets the requirements under the definition of this facility in [Wis. Stat.](#) § 48.02(14m). Also, although the child is with a parent in the facility, it is still considered an out-of-home placement, and the out-of-home findings are necessary. *See* [Wis. Stat.](#) § 48.355(2)(b).

The statutory requirements for QRTP placement also help to ensure that all alternatives to an institutional placement are being explored for a child before placement. A case manager must confirm that there are no other options for a child, document all efforts to evaluate other options, and have the court review that documentation. These requirements increase the number of individuals, including the guardian ad litem, who help to ensure that a child is placed in the least restrictive placement that still meets the child's needs.

V. Miscellaneous Wis. Stat. Ch. 48 Proceedings [§ 4.65]

A. Wis. Stat. § 48.977 Guardianships [§ 4.66]

[Wis. Stat.](#) § 48.977 provides a guardianship procedure that is intended for use when a child has been adjudicated in need of protection or services. Guardianship under this statute is appropriate when the child has been outside the parental home for a considerable period of time or when it is clear that the child will not likely be placed with the child's parents in the future. This can happen when the parents have not and probably will not meet their conditions for return, and termination of parental rights is either unavailable or contrary to the child's best interests. This procedure is separate from the guardianship procedures under [Wis. Stat.](#) § 48.9795. Examples might include a situation in which grounds cannot be proved for technical reasons (such as insufficient warnings or a lack of departmental diligent efforts), the child cannot be adopted (for example, because of the child's age or behavioral issues),

or the child is strongly attached to a parent or other relative who is not a placement resource. Guardianship is also commonly used when a child is placed with a relative.

Most [Wis. Stat.](#) ch. 48 guardianships are governed by [Wis. Stat.](#) § 48.977, as discussed in this section, and by [Wis. Stat.](#) § 48.9795, as discussed in sections [4.67–83](#), *infra*. [Wis. Stat.](#) § 48.978 provides a means for a parent to designate a standby guardian.

Note. The rights, remedies, and procedures provided under the law for guardianships of the person of a minor, [Wis. Stat.](#) § 48.9795, or the provisions for guardianships of the estate of a minor under [Wis. Stat.](#) ch. 54, will govern proceedings for standby guardians, unless [Wis. Stat.](#) § 48.978 provides a different right, remedy, or procedure.

Cases under [Wis. Stat.](#) §§ 48.977 and 48.978 require a guardian ad litem, *see* [Wis. Stat.](#) § 48.235(1)(c). An action under [Wis. Stat.](#) § 48.977 is commenced by the filing of a petition, which may be filed by the child; the child’s guardian, legal custodian, or Indian custodian; the child’s guardian ad litem; the parent; any person with placement; the DCF; the applicable county department; the responsible agency; or the public representative. [Wis. Stat.](#) § 48.977(4)(a).

The petition must allege the following: (1) that the child has been adjudicated in need of protection or services under [Wis. Stat.](#) § 48.13 and placed outside the parental home pursuant to one or more CHIPS dispositional orders (or adjudicated as a juvenile in need of protection or services under [Wis. Stat.](#) § 938.13(4) (uncontrollable juvenile), *see* [Wis. Stat.](#) § 48.977(2)(a)); (2) that the proposed guardian has placement under the current dispositional order and that it is likely that the child will continue in that placement until age 18 or for an extended period of time; (3) that the proposed guardian is willing to serve in that capacity for the necessary period of time; (4) that it would not be in the child’s best interests to file a TPR petition; (5) that the child’s parents are neglecting or refusing or are unable to carry out the duties of a guardian; and (6) that the agency assigned to provide services under the dispositional order has made “reasonable efforts” to bring about the child’s return to a parental home, consistent with the child’s health and safety, and that such return is either unlikely or undesired. [Wis. Stat.](#) § 48.977(2). Reasonable efforts are not required under [Wis. Stat.](#) § 48.977(2) if the specified circumstances in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. apply. The petition must also contain the specific information listed in [Wis. Stat.](#) § 48.977(4)(b)1.–6., such as the child’s name, birth date, and address and whether the child has been adopted.

Under [Wis. Stat.](#) § 48.977, the proceedings commence with a plea hearing and, if contested, move on to a trial to the court. The fact-finding hearing must be held within 30 days after the plea hearing, [Wis. Stat.](#) § 48.977(4)(cm)3., which must be held within 30 days after the filing of the petition. [Wis. Stat.](#) § 48.977(4)(cm)1. The dispositional hearing, if grounds for guardianship are found, must be held within 30 days after the fact-finding hearing, [Wis. Stat.](#) § 48.977(4)(d), and a dispositional order must be issued within 10 days after the dispositional hearing. [Wis. Stat.](#) § 48.977(4)(h). Dispositional factors for a guardianship determination include whether the person would be a suitable guardian, the willingness of the guardian to serve until the child is 18, the wishes of the child, and if an ICWA case, whether the proposed guardian falls within the placement preferences of the tribe. [Wis. Stat.](#) § 48.977(4)(g). The guardianship can be terminated under various circumstances, such as (1) when the child attains 18 years of age; (2) upon a showing, by clear and convincing evidence, that there is a need to remove a guardian for cause; (3) if the guardian resigns; (4) at the request of a parent; or (5) if there is a subsequent termination of parental rights. [Wis. Stat.](#) § 48.977(7).

Comment. Regarding termination of guardianships, although [Wis. Stat.](#) § 48.977(7)(d) applies the “best interests of the child” standard to parental requests for termination of the guardianship, that standard may be constitutionally suspect. *See Cynthia H. v. Joshua O. (In re Guardianship of Clive R.O.)*, [2009 WI App 176](#), ¶ 50, [322 Wis. 2d 615](#), [777 N.W.2d 664](#) (rejecting grandmother’s “argument that [[Wis. Stat.](#) ch.] 54 changed the legal standard that is to be applied to petitions for guardianship of a minor to the ‘best interests’ of the child test”). The other requirements—a showing of a substantial change of circumstances and a showing that the parent is willing and able to carry out the duties of a guardian—are clearly valid.

A guardianship under [Wis. Stat.](#) ch. 48 can also be a subsidized guardianship pursuant to [Wis. Stat.](#) § 48.623. The most important factors to qualify for a subsidized guardianship are that the proposed guardian must be licensed as a foster parent and that person must be a relative to the child or have a significant emotional relationship with the child or the child’s family. *See* [Wis. Stat.](#) § 48.623(1)(b); [Wis. Admin. Code](#) § DCF 55.02(5g) (defining “fictive kin”). There are other factors and conditions that must be met for an agency to consider eligibility for a subsidized guardianship with which the guardian ad litem should be familiar.

A subsidized guardianship can be a preferable alternative to a termination of parental rights because it allows for long-term financial assistance for a guardian similar to the assistance for an adoption of a child with special needs. *See generally* DCF, *Subsidized Guardianship in Wisconsin*, <https://dcf.wisconsin.gov/guardian/subsidized> (last visited Sept. 24, 2024). The amount of

financial assistance in a subsidized guardianship is similar to the monthly foster-care payment and is ultimately paid by the state of Wisconsin and not the local county. This type of guardianship, and the payment by the state for the subsidy, has also extended to payments made by Indian tribes for subsidized guardianships.

B. Wis. Stat. § 48.9795 Guardianships [§ 4.67]

1. In General [§ 4.68]

[Wis. Stat.](#) § 48.9795 sets forth the procedures for guardianships of the person for a child. Before the creation of this statute, *see* 2019 Wis. Act 109 (eff. Aug. 1, 2020), proceedings for guardianships of the person and of the estate for a minor were conducted under [Wis. Stat.](#) ch. 54 and typically through the probate court. But it was not productive to apply to children guardianship procedures intended for adults; a [Wis. Stat.](#) ch. 54 guardianship of the person never was applicable to all scenarios that a child, who is not subject to a CHIPS petition, could face. The procedures for guardianships of the person for a child under [Wis. Stat.](#) § 48.9795 are meant to be used instead of the [Wis. Stat.](#) ch. 54 procedures for guardianships of the person. A guardianship of the estate for a minor is still available under [Wis. Stat.](#) ch. 54, but it is no longer listed under [Wis. Stat.](#) § 48.14(2)(b) as a proceeding for which the children's court has exclusive jurisdiction. Guardianships of the estate of minors are discussed in [chapter 6, *infra*](#).

2. Four Guardianship Types [§ 4.69]

The Children's Code provides four types of guardianships of the person for a child—emergency, temporary, limited, and full:

- An emergency guardianship is used when the welfare of the child requires the immediate appointment of a guardian. This guardianship can last up to 60 days with powers limited to the specific situation. [Wis. Stat.](#) § 48.9795(2)(d)4., (6).
- A temporary guardianship is used when a child's situation warrants a guardianship for a temporary period—for example, if a parent is not able to care for a child for a few weeks or months. [Wis. Stat.](#) § 48.9795(2)(d)3., (5). The court may order a temporary guardianship for up to 180 days, with one 180-day extension. [Wis. Stat.](#) § 48.9795(5). This guardianship also limits the powers provided to a guardian to fit the child's specific situation. *Id.*
- A limited guardianship is for a child whose parents need assistance to provide care. [Wis. Stat.](#) § 48.9795(4)(b)5. A court can limit the guardian's duties to be very specific to the situation. The child's parents could retain some power or decision-making authority, and the court can allow for shared physical custody of a child. A limited guardianship must have an expiration date, which the court can extend if good cause is shown. [Wis. Stat.](#) § 48.9795(2)(b)2.
- A full guardianship is the most similar to what is in place under [Wis. Stat.](#) § 48.977 but does not require a child to be adjudicated in need of protection or services as a basis for the guardianship. If a parent is unfit, unwilling, or unable to care for the child or there are other facts and circumstances that warrant a guardianship, a full guardianship pursuant to [Wis. Stat.](#) § 48.9795 may be necessary. With this guardianship, the guardian could have full powers under [Wis. Stat.](#) ch. 48 as well as authority to determine reasonable visitation with the child and to change the child's state of residence. [Wis. Stat.](#) § 48.9795(2)(d)1.a., b., c. The guardian also must file an annual report (including the location of the child, the health condition of the child, and any recommendations for the child) with the court and alert the court as to any changes in address. [Wis. Stat.](#) § 48.9795(2)(d)1.d.

Under a [Wis. Stat.](#) § 48.9795 guardianship, a parent retains any parental power or duty that is not granted to the child's guardian. [Wis. Stat.](#) § 48.9795(2)(d)5.

3. Who Can File? [§ 4.70]

A petition may be filed by any person, including a child who is 12 years old or older. [Wis. Stat.](#) § 48.9795(4)(a)1. If there are other matters pending under [Wis. Stat.](#) ch. 48 or 938, the petition for guardianship must be consistent with the goals of the child's permanency plan and cannot change any preexisting court orders. [Wis. Stat.](#) § 48.9795(4)(a)2.

4. Venue and Jurisdictional Matters [§ 4.71]

Venue is the child's county of residence, where the child is physically present, or if the child is a nonresident, the county where the petitioner proposes that the child reside. [Wis. Stat. § 48.9795\(2\)\(a\)](#).

If there is a separate proceeding for a guardian of estate for a child under [Wis. Stat. ch. 54](#), then the children's court may consolidate that proceeding with one for a guardianship of the person for a child under [Wis. Stat. § 48.9795\(2\)\(b\)1](#). If the child is also subject to another specified proceeding under [Wis. Stat. ch. 48](#), then any petition for full, limited, or temporary guardianship will be stayed until the other proceeding concludes. The court can, however, order an emergency guardianship while these matters are pending if it is in the child's best interests. [Wis. Stat. § 48.9795\(2\)\(b\)2](#).

5. Petition Contents [§ 4.72]

A petition for guardianship under [Wis. Stat. § 48.9795](#) must be titled "In the interest of ... (child's name), a person under the age of 18" and must include the name, date of birth, and address of the child; and the names and addresses of the petitioner, the parents, the current guardian and legal custodian (if applicable), the proposed guardian and any proposed successor guardian, and all other interested persons. It must also state the type of guardianship requested; the facts and circumstances to support the guardianship; information that the proposed guardian is fit, willing, and able to serve; the information required in Form [GF-150](#) (Uniform Child Custody Jurisdiction and Enforcement Act Affidavit); information about whether the child is an Indian child under ICWA; whether any other guardianship or related proceeding is pending in another court involving the same child; and whether any matter is pending in another court subject to a court order under [Wis. Stat. § 48.13](#), [48.133](#), or [48.14](#) or [Wis. Stat. ch. 938](#). [Wis. Stat. § 48.9795\(4\)\(b\)](#).

The fact and circumstances alleged in the petition should relate to the type of guardianship sought.

6. Guardian ad Litem [§ 4.73]

The court must appoint a guardian ad litem when a petition is filed for appointment of a guardian or termination of a guardianship under [Wis. Stat. § 48.9795](#), and the appointment must occur as soon as possible and before the initial hearing. [Wis. Stat. § 48.9795\(3\)\(a\)](#); see also [Wis. Stat. § 48.235\(1\)\(c\)](#). See section [4.6, supra](#), for a description of the guardian ad litem's duties and responsibilities in these cases.

[Wis. Stat. § 48.9795\(3\)\(c\)](#) requires the guardian ad litem to inspect reports and records relating to the child. Under the statute governing the confidentiality of records relating to child abuse and neglect, a guardian ad litem in [Wis. Stat. § 48.9795](#) guardianship proceedings may obtain these confidential records to the extent necessary to fulfill the duties and responsibilities required by [Wis. Stat. § 48.9795\(3\)\(c\)](#). [Wis. Stat. § 48.981\(7\)\(a\)11v](#). In the order appointing a guardian ad litem in these cases, the court can specifically grant access to agency records. The guardian ad litem should make sure this is checked on any orders to quickly facilitate the guardian ad litem's ability to review this information. See Form [JD-1798A](#).

7. Emergency Guardianships [§ 4.74]

The court must hold a hearing on a petition for an emergency guardianship as soon as possible after a petition has been filed. [Wis. Stat. § 48.9795\(6\)\(b\)4](#). The court must also appoint a guardian ad litem for the child as soon as possible after the filing of the petition. [Wis. Stat. § 48.9795\(6\)\(b\)3](#). Upon finding good cause, the court may issue a temporary order appointing an emergency guardian without a hearing, and the order will remain in effect until the hearing can be held. [Wis. Stat. § 48.9795\(6\)\(b\)4](#). The petitioner must serve notice of the hearing and a copy of the petition as soon as possible, by the most practical means, which could be personal mail, email, or telephone. [Wis. Stat. § 48.9795\(6\)\(b\)2](#).

Notice in an emergency guardianship case must also include a notice of the right to petition for reconsideration or modification of the court's order. If a person files a petition for reconsideration or modification, the court must hear the petition within 30 days. [Wis. Stat. § 48.9795\(6\)\(b\)5](#).

The court may appoint an emergency guardian for up to 60 days. [Wis. Stat. § 48.9795\(6\)\(a\)](#). The court must specify the powers given to an emergency guardian as determined by the need for the guardianship to be ordered. *Id.* ("[A]uthority ... shall be limited to those acts that are reasonably related to the reasons for the appointment..."). An emergency guardianship terminates at the expiration of the court's order, and the court may require the guardian to file a report. [Wis. Stat. § 48.9795\(6\)\(d\)](#).

8. Initial Hearing Time Frame and Notice (Full, Limited, and Temporary Guardianships) [§ 4.75]

The initial hearing for a full, limited, or temporary guardianship must be heard within 45 days after filing the petition. [Wis. Stat. § 48.9795\(4\)\(e\)1.](#)

The petitioner must serve notice of the hearing, with the exception of an emergency guardianship hearing or a case in which the child is an Indian child, and a copy of the petition on all interested persons at least seven days before the hearing. [Wis. Stat. § 48.9795\(4\)\(c\)1.](#) This notice must be delivered in person or by certified mail to the last-known address of the person. [Wis. Stat. § 48.9795\(4\)\(c\)2.](#) If the child is an Indian child, there can be no hearing until at least 10 days after receipt of the hearing notice by the Indian child's parent, the Indian custodian, and the tribe. If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, the hearing cannot occur until at least 15 days after receipt of notice of the hearing by the U.S. Secretary of the Interior. [Wis. Stat. § 48.9795\(4\)\(c\)3.](#)

[Wis. Stat. § 48.9795\(1\)\(a\)](#) provides two different definitions of an interested person. First, for purposes of a petition, an interested person is a child (if 12 years old or older); the child's guardian ad litem or attorney; the child's parent, guardian, legal custodian, and physical custodian; any person who has filed a declaration of paternal interest, who is alleged to be the father or may be the father; the nominated guardian or successor guardian; if no living parent, any individual named as fiduciary for the child in a will or like document; if the child is receiving or in need of public services or benefits, the county department (or, in Milwaukee County, the appropriate department providing services); if a child is an Indian child, the Indian custodian and Indian tribe; and anyone else the court may require. [Wis. Stat. § 48.9795\(1\)\(a\)1.](#) Second, for proceedings after an order for guardianship, an interested person includes the child (if 12 years old or older); the child's guardian ad litem or attorney; the child's parent or guardian; the county of venue; if the child is an Indian child, the Indian child's tribe; and any other person that the court may require. [Wis. Stat. § 48.9795\(1\)\(a\)2.](#)

9. Statement by Proposed Guardian [§ 4.76]

At least 96 hours before the initial hearing, the proposed guardian must submit to the court a notarized statement. [Wis. Stat. § 48.9795\(4\)\(d\).](#) The guardian ad litem should make sure the proposed guardian knows this statement must be notarized; for some proposed guardians, locating a notary might present a challenge. The notarized statement must indicate the following: the number of persons the proposed guardian is responsible for; the proposed guardian's income, assets, debts, and living expenses; and whether the proposed guardian is currently charged with or has been convicted of abusing or neglecting a child as determined under [Wis. Stat. § 48.981\(3\)\(c\).](#) If the proposed guardian is currently charged with, or has been convicted of, a crime listed in [Wis. Stat. § 48.981\(3\)\(c\),](#) the statement must also include a description of the circumstances surrounding the charge, conviction, or determination. [Wis. Stat. § 48.9795\(4\)\(d\).](#)

10. Procedures at Hearings [§ 4.77]

Similar to a CHIPS or termination-of-parental-rights proceeding, a proceeding for a full, temporary, or limited guardianship has a fact-finding hearing and a dispositional hearing. If a matter is not contested, both phases can take place at the initial hearing. If the matter is contested and a party requests an adjournment, the court will schedule the fact-finding and dispositional hearing within 30 days after the initial hearing.

Practice Tip. In practice, given the challenges of scheduling time on the court's docket and attorneys' calendars, it is likely that a hearing for a fully contested matter would not occur within 30 days. A party requesting additional time should ensure the court makes a record to extend this time frame.

The proposed guardian and any proposed successor guardian must be physically present at the hearing, unless the court excuses them or allows them to appear by telephone. [Wis. Stat. § 48.9795\(4\)\(e\)2.](#) The child need not be present at the hearing, but if the child has nominated the proposed guardian, the child must provide information to the guardian ad litem to support that the proposed guardianship is in the child's best interests. *Id.*

If an alleged father of the child is present at the hearing, the court can stay proceedings and allow for paternity to be established under [Wis. Stat. § 48.299\(6\).](#) The court can appoint a temporary guardianship until the outcome of the paternity proceedings. [Wis. Stat. § 48.9795\(4\)\(e\)3.](#)

At a fact-finding hearing, the court must determine whether the petitioner has proved the facts alleged in the petition by clear and convincing evidence. If so, the proceedings move to disposition. During the dispositional phase, the court must consider the following factors under [Wis. Stat. § 48.9795\(4\)\(g\)](#): any nominations by the parents or child for a guardian and the parents' and child's opinions as to what is in the child's best interests; whether the proposed guardian is fit, willing, and able to serve as guardian; for an Indian child, whether the proposed guardian meets the placement preferences under ICWA; and whether the appointment is in the child's best interests.

The court may admit all testimony having reasonable probative value, unless it is immaterial, irrelevant, or unduly repetitious or is inadmissible under [Wis. Stat. § 901.05](#). [Wis. Stat. § 48.299\(4\)\(b\)](#). The court may also admit hearsay evidence that has a demonstrable circumstantial degree of reliability. *Id.*

11. Dispositions [§ 4.78]

At the end of a guardianship hearing, the court can dismiss the petition and may refer the child to an intake inquiry under [Wis. Stat. § 48.24](#) or act as an intake worker for the child under [Wis. Stat. § 48.10](#). [Wis. Stat. § 48.9795\(4\)\(h\)1](#). Alternatively, the court can order the guardianship as petitioned. [Wis. Stat. § 48.9795\(4\)\(h\)2](#).

Note. If a parent has nominated a guardian or successor guardian, including a nomination by will, subject to rights of a surviving parent, the court will grant the guardianship unless it is found to not be in the best interests of the child. [Wis. Stat. § 48.9795\(2\)\(c\)1.](#); *cf.* [Wis. Stat. § 48.9795\(2\)\(c\)2.](#) (providing considerations when child nominates guardian).

The dispositional order cannot change the child's placement if the child is under an order for supervision pursuant to [Wis. Stat. § 48.13](#), [48.133](#), [48.14\(1\)–\(10\)](#) or [\(12\)](#) or [Wis. Stat. ch. 938](#). [Wis. Stat. § 48.9795\(4\)\(h\)2](#). If there is an order appointing a guardian, it must include information as to the type of guardianship ordered and the powers given to the guardian; the amount of support, if any, to be paid by the parents; and if needed, an order for visitation. [Wis. Stat. § 48.9795\(4\)\(h\)2.a., b., c.](#)

Note. There is a presumption that the guardian's decisions regarding visitation are in the child's best interests, and that if the matter is contested it is the petitioner's burden to prove by clear and convincing evidence that the guardian is wrong. [Wis. Stat. § 48.9795\(4\)\(h\)2.c.](#)

The court can make the necessary findings in these proceedings and still find that the proposed guardian is not fit, willing, and able to serve or that the proposed guardian's appointment is not in the child's best interests. If this occurs, there can be an adjournment for no more than 30 days for any party to nominate a new guardian and for the guardian ad litem to report to the court if the newly proposed guardian is fit, willing, and able to serve. [Wis. Stat. § 48.9795\(4\)\(i\)](#).

12. Standby and Successor Guardians [§ 4.79]

If there is a need for a standby guardian to be appointed because of the guardian's incapacity, death, or debilitation, a petition can be filed under [Wis. Stat. § 48.978](#). [Wis. Stat. § 48.9795\(7\)](#).

The petitioner also can request a successor guardian in the initial petition for appointment of guardian or at any time after the actual appointment. If the petition for a successor guardian is filed after a guardian is appointed by the court, the procedure for the petition is the same as for the original guardianship petition. [Wis. Stat. § 48.9795\(8\)\(a\)1](#).

If the original guardianship dispositional order has designated a successor guardian, that person's appointment becomes effective if the initial guardian dies, is unable or unwilling to serve, resigns, or is removed by the court. The successor guardian's power may also become effective when the initially appointed guardian is temporarily unable to fulfill the guardian's duties, including during an extended vacation or illness. When the successor guardianship becomes effective, that individual needs to request new letters of guardianship from the court. [Wis. Stat. § 48.9795\(8\)\(a\)2](#).

If the original guardianship order does not designate a successor guardian, and the guardian dies, is removed by court order, or resigns, then the court or any interested person may petition to appoint a successor guardian. [Wis. Stat. § 48.9795\(8\)\(b\)1](#). The petition can be heard in the same manner as the initial appointment of guardian or can be determined by the court without a hearing. *Id.* If

there is no hearing, the successor guardian must provide notice to all interested persons about the appointment and the right to petition for reconsideration or modification within seven days after the appointment. [Wis. Stat. § 48.9795\(8\)\(b\)2](#).

13. Other Postdispositional Matters [§ 4.80]

The court that appointed the initial guardian has continuing jurisdiction over the matter, including if there is a need to review the guardian's conduct. [Wis. Stat. § 48.9795\(10\)\(a\)](#). The court can take action and impose sanctions if the guardian does any of the following: (1) abuses or neglects the child or knowingly allows someone else to do so, (2) is determined to have left out information in the initial statement by the proposed guardian that would have prevented the appointment, (3) fails to comply with a court order, or (4) fails to perform any statutorily required acts or duties. [Wis. Stat. § 48.9795\(10\)\(b\)](#). An interested party can petition the court requesting a review of the guardian, and the hearing must be held within 30 days. [Wis. Stat. § 48.9795\(10\)\(c\)](#). Seven days before the hearing, the petitioner must provide notice to the child, parents, guardian, and other persons required by the court and include the petition to review the guardian's conduct. *Id.* If the allegations in the petition are proved by clear and convincing evidence, the court can remove the guardian, remove the guardian and appoint a successor guardian, order the guardian to carry out certain tasks, or modify duties of the guardian. [Wis. Stat. § 48.9795\(10\)\(d\)](#). If the guardian's actions are egregious, the court could order the guardian to pay the costs for this hearing, including attorney fees. [Wis. Stat. § 48.9795\(10\)\(d\)5](#).

14. Termination [§ 4.81]

For a temporary guardianship, the court's order cannot last for more than 180 days, with one 180-day extension, if the court finds good cause to do so. [Wis. Stat. § 48.9795\(5\)\(a\)](#) (also limiting temporary guardianship powers to only those acts reasonably related to reasons for appointment specified in petition). A temporary guardianship terminates at the expiration of the order, and the court may require the guardian to file any reports or information requested. [Wis. Stat. § 48.9795\(5\)\(c\)](#).

In a limited guardianship order, the court will set an expiration date. [Wis. Stat. § 48.9795\(2\)\(d\)2](#).

A guardianship order without a specifically listed expiration date typically lasts until the child is 18 years old. [Wis. Stat. § 48.9795\(11\)\(a\)](#). The order could end before the child's 18th birthday if the child marries, the child dies, the child moves to a new state and a guardian is appointed there, the guardian dies or resigns and there is not a successor guardian, the guardian is removed for cause, the court terminates the order at the request of a parent or child, or the child is adopted. *Id.* A parent or a child may petition a court to terminate a guardianship order and must allege that there is a substantial change in circumstances since the last order affecting the guardianship; that the parent is fit, willing, and able to carry out the duties of a guardian or that there are no compelling facts to support the existing guardianship; and that termination of a guardianship is in the child's best interests. [Wis. Stat. § 48.9795\(11\)\(b\)1](#). There can be a hearing for the termination petition, or the court can approve the request through written waivers signed by all interested parties. [Wis. Stat. § 48.9795\(11\)\(b\)2](#). If there is a hearing, there must be seven-day notice to the child, the parents, the guardian, and any other persons required by the court. [Wis. Stat. § 48.9795\(11\)\(b\)3](#). The court must terminate the guardianship if it finds that the petitioner has shown the allegations in the petition by a preponderance of the evidence. *Id.*

15. Nonparental Visitation [§ 4.82]

[Wis. Stat. § 48.14](#) provides the children's court with jurisdiction to grant visitation privileges under [Wis. Stat. § 48.9795\(12\)](#). This section, commonly referred to as the "grandparent's rights" statute, allows a court to order visitation between grandparents or stepparents and a child whose parent or parents are deceased, if the surviving parent or person with legal custody has notice of the hearing and the court finds visitation in the child's best interests. [Wis. Stat. § 48.9795\(12\)](#). A grandparent or stepparent may file this petition for visitation with a petition for a guardianship or temporary guardianship or in an independent action. [Wis. Stat. § 48.9795\(12\)\(b\)](#).

16. Appeals [§ 4.83]

A final judgment or order in a guardianship case under [Wis. Stat. § 48.9795](#), is not considered a "final adjudication" under [Wis. Stat. § 809.30\(1\)\(a\)](#). In other words, similar to a proceeding for termination of parental rights, the rules for criminal appeals under [Wis. Stat. § 809.30](#) do not apply to appeals from [Wis. Stat. § 48.9795](#) orders for guardianships of the person for a child.

C. Other Minor Guardianships [§ 4.84]

Guardianships of the estate of a minor are filed pursuant to [Wis. Stat.](#) ch. 54 and are beyond the scope of this chapter. *See infra* [ch. 6](#). It is worth pointing out, however, that a proceeding for a [Wis. Stat.](#) ch. 54 guardianship of the estate for a minor may be consolidated in the children's court with a proceeding for a [Wis. Stat.](#) § 48.9795 guardianship of the person for a child. [Wis. Stat.](#) § 48.9795(2)(b)1.; *see supra* §§ [4.67–.83](#). This is a situation in which a circuit court assigned to the case serves two functions, both probate and juvenile.

Although the fact that minor guardianships are juvenile court proceedings may have little impact on most cases, there are a few important consequences:

1. The guardian ad litem is ordinarily paid by the county of venue; however, in a [Wis. Stat.](#) ch. 48 proceeding, the court may order one or both parents (but no other parties) to pay the guardian ad litem's fees and costs, including the cost of an expert necessarily retained by the guardian ad litem. [Wis. Stat.](#) § 48.235(8).
2. In addition to the confidentiality requirements of guardianships, proceedings and records of juvenile courts have separate confidentiality provisions. *See* [Wis. Stat.](#) § 48.78.

D. Restraining Orders and Injunctions [§ 4.85]

When proceedings for child abuse restraining orders and harassment restraining orders under [Wis. Stat.](#) § 813.122 or 813.125 are initiated with respect to a minor respondent, such proceedings are juvenile court proceedings under [Wis. Stat.](#) § 48.14(10). The procedure is somewhat different for each section. The temporary restraining order is in effect until a hearing is held on issuance of an injunction under [Wis. Stat.](#) § 813.122(5). *See* [Wis. Stat.](#) § 813.122(4)(c). A judge or court commissioner must not extend the temporary restraining order in lieu of ruling on the issuance of an injunction, except that the court may extend the temporary order under [Wis. Stat.](#) § 813.1285. *Id.*

Note. A child abuse injunction can be in effect permanently upon the request of the petitioner if the respondent has been convicted of certain crimes in which the child victim was the crime victim. [Wis. Stat.](#) § 813.122(5)(dm)1m. A respondent may file a motion for the court to review a permanent injunction if the underlying criminal conviction has been vacated. [Wis. Stat.](#) § 813.126(1m).

Because a court under [Wis. Stat.](#) ch. 48 also has jurisdiction over harassment restraining orders and injunctions under [Wis. Stat.](#) § 813.125, the guardian ad litem should know that the court may order a permanent injunction under [Wis. Stat.](#) § 813.125(4)(d)1m. To request a permanent harassment injunction under [Wis. Stat.](#) § 813.125(4)(d)1m., the petitioner must be the crime victim of the respondent who was convicted of first-, second-, or third-degree sexual assault under [Wis. Stat.](#) § 940.255(1)–(3).

In child abuse actions under [Wis. Stat.](#) § 813.122, a guardian ad litem for the child victim may be appointed in all cases. [Wis. Stat.](#) § 813.122(3)(b)1m. A guardian ad litem *must* be appointed for the child victim if the alleged child abuser is a parent of the child. [Wis. Stat.](#) § 813.122(3)(b)2m. Any guardian ad litem appointed under [Wis. Stat.](#) § 813.122(3) is appointed pursuant to [Wis. Stat.](#) § 48.235 because the proceedings are juvenile court proceedings under [Wis. Stat.](#) § 48.14(10).

The guardian ad litem's role in actions under [Wis. Stat.](#) § 813.122 is not precisely defined by statute. It is appropriate that the guardian ad litem conduct an investigation, which may include interviews with the child, the parents, the police, health-care providers, and social workers. Care should be taken when interviewing the alleged abuser, both with respect to the possible existence of counsel (a guardian ad litem cannot communicate with a party represented by counsel without counsel's approval because of ethical obligations) and the existence of due-process and Fifth Amendment rights. The guardian ad litem should be prepared to recommend for or against the requested injunction and may need to take a lead role at the hearing, especially when a petitioner is unrepresented. The guardian ad litem may also need to address the parent's visitation rights and recommend supervised or unsupervised visitation conditions. *See* [Wis. Stat.](#) § 813.122(5)(b).

For harassment injunctions under [Wis. Stat.](#) § 813.125, the court may appoint counsel for the respondent child and may appoint a guardian ad litem for the respondent child. *See* [Wis. Stat.](#) §§ 48.23, 48.235. The respondent child *must* be represented, however, by the child's guardian, adversary counsel, or guardian ad litem. [Wis. Stat.](#) § 803.01(3). An example of a harassment action involving a minor respondent would be if one 15-year-old high school student alleges that another 15-year-old high school student is engaging in harassment. Because the respondent child is a minor, [Wis. Stat.](#) § 48.14(10) applies and the matter is a juvenile court proceeding.

The guardian ad litem's role in cases under [Wis. Stat. § 813.125](#) is not statutorily defined. To protect the interest of the respondent child, an investigation of the circumstances alleged is necessary. Thus, it makes sense for the guardian ad litem to attempt to understand the nature of the underlying conflict, and to determine whether alternative resolutions to the dispute exist that do not criminalize a future violation (for example, most schools offer dispute resolution procedures for students involved in controversies). The guardian ad litem may wish to determine whether the respondent is also being harassed, so that the relief can be mutual.

The guardian ad litem appointed to represent a child respondent in child abuse restraining order proceedings, and the guardian ad litem appointed to represent a minor respondent in harassment restraining order proceedings, are ordinarily paid by the county of venue. In a proceeding under [Wis. Stat. § 813.122](#) or [Wis. Stat. § 813.125](#), the court cannot order the child victim, or any parent, stepparent, or legal guardian of the child victim who is not a party to the action, to pay any part of the guardian ad litem's compensation. [Wis. Stat. § 48.235\(8\)\(c\)3](#). This is an exception to the general rule that the court may order one or both parents (but no other parties) to pay the guardian ad litem's fees and costs, including the cost of an expert necessarily retained by the guardian ad litem if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing the guardian ad litem's functions or duties. [Wis. Stat. § 48.235\(8\)\(b\)](#).

E. Wis. Stat. Ch. 51 and 55 Proceedings [§ 4.86]

[Wis. Stat.](#) ch. 51 and 55 proceedings are beyond the scope of this chapter. But when such proceedings involve minors, they are juvenile court proceedings. See [Wis. Stat. § 48.14\(5\)](#). The observations in section [4.84](#), *supra*, are pertinent here. See *infra* [chs. 7](#) ([Wis. Stat.](#) ch. 55 proceedings), [§ 8](#) ([Wis. Stat.](#) ch. 51 proceedings).

F. Wis. Stat. § 48.979 Power of Attorney [§ 4.87]

[Wis. Stat.](#) ch. 48 allows parents with legal custody of a child to use a power of attorney (POA), properly executed by all parents who have legal custody of the child, to delegate full or partial parental powers to an agent without initial court or social services involvement. [Wis. Stat. § 48.979](#). Separate from the guardianship procedure in [Wis. Stat. § 48.977](#), the POA delegation procedure is intended for use during necessary parental absences. Parents struggling with medical, emotional, or addiction issues may designate an appropriate adult to care for their children, as may parents who are in the military, incarcerated, or away from home because of other responsibilities.

A parent may delegate the care and custody of the child, except the power to consent to the marriage or adoption of the child, the performance or inducement of an abortion on or for the child, the termination of parental rights to the child, or the enlistment of the child in the U.S. armed forces. [Wis. Stat. § 48.979\(1\)\(a\)](#). A parent cannot delegate powers regarding the care and custody of a child who is subject to the jurisdiction of the juvenile court unless the court approves the delegation. [Wis. Stat. § 48.979\(1\)\(bm\)](#). Nor may a parent place the child in a foster home, group home, shelter care facility, or inpatient treatment facility by means of a delegation of powers. [Wis. Stat. § 48.979\(1\)\(c\)](#). A parent who delegates parental powers regarding the care and custody of a child may revoke that delegation at any time by executing a written revocation and notifying the agent in writing of the revocation. [Wis. Stat. § 48.979\(1\)\(e\)](#). A written revocation invalidates the delegation of powers except with respect to acts already taken in reliance on the delegation of powers. *Id.*

Practice Tip. The form captioned “Power of Attorney Delegating Parental Power” is set forth in [Wis. Stat. § 48.979\(2\)](#) and complies with the requirements of [Wis. Stat. § 48.979](#). The guardian ad litem should be familiar with this form and determine whether the child for whose best interest the guardian ad litem is appointed is the subject of a POA delegating parental power. A POA that substantially conforms to the form in [Wis. Stat. § 48.979\(2\)](#) complies with the requirements of [Wis. Stat. § 48.979](#).

A delegation of powers to an agent may remain in effect for no longer than one year, unless it is to a relative of the child or the delegation is approved by a court. [Wis. Stat. § 48.979\(1\)\(am\)](#). When a parent seeks a delegation of powers for longer than one year to an agent who is not a relative of the child, a petition must be filed under [Wis. Stat. § 48.979\(1m\)](#) by the parent, the agent to whom the parent wishes to delegate those powers, or an organization that is facilitating that delegation. [Wis. Stat. § 48.979\(1m\)\(a\)](#). The petitioner must attach to the petition a draft copy of the POA delegating parental powers. The petitioner must state facts and circumstances showing that the delegation of powers would be in the best interests of the child and that the person nominated as agent is fit, willing, and able to exercise those powers. *Id.*

The petitioner must serve the petition and notice of the time and place of the hearing at least 10 days before the time of the hearing on the following: the child, if 12 years of age or older; the child's guardian ad litem and counsel, if any; the parents of the child; the person nominated as agent; any guardian, legal custodian, and physical custodian of the child; any organization that is facilitating the delegation of powers; and if the child is an Indian child, the Indian child's Indian custodian, if any, and tribe, if known, to allow the tribe to intervene or take jurisdiction. The court must hold a hearing on a petition within 45 days after the filing of the petition. [Wis. Stat. § 48.979\(1m\)\(b\)](#).

The best interests of the child is the prevailing factor for the court to consider in determining the appropriate disposition of a petition. [Wis. Stat. § 48.979\(1m\)\(d\)](#). A disposition approving the proposed delegation of powers requires the court to find that the petitioner has proved the allegations in the petition by clear and convincing evidence and to determine that the proposed delegation of powers is in the best interests of the child. [Wis. Stat. § 48.979\(1m\)\(e\)2](#). The disposition may designate an amount of support to be paid by the child's parents to the agent. *Id.* If the court approves the proposed delegation of powers in the child's best interest, the parent and the person nominated as agent may execute a POA delegating those powers as approved by the court. *Id.*

Note. A person delegated care and custody of a child under [Wis. Stat. § 48.979](#) may, but is not mandated to, report any suspected or threatened abuse or neglect of the child. [Wis. Stat. § 48.981\(2r\)](#).

If a child who is the subject of the petition might be an American Indian child, the court must apply WICWA. [Wis. Stat. § 48.979\(1m\)\(bm\)](#); *see supra* § 4.51. The court must consider a specific order of placement preferences or tribal law or custom for an Indian child, if the placement or delegation is appropriate for the Indian child's special needs, if any, and the placement is the least restrictive setting appropriate for the Indian child's needs. [Wis. Stat. § 48.979\(1m\)\(d\)](#); *see also* [Wis. Stat. § 48.028\(7\)\(a\), \(c\)](#). When appropriate, the court must consider the preference of the Indian child or parent, and, when a parent who has consented to the placement or delegation evidences a desire for anonymity, the court must give weight to that desire in determining the placement or delegation. [Wis. Stat. § 48.979\(1m\)\(d\)](#); *see also* [Wis. Stat. § 48.028\(7\)\(c\)](#).

Whether there is good cause to depart from the order of placement preference must be determined based on one or more factors, including (1) the request of the Indian child's parent or, if the Indian child is of sufficient age and developmental level to make an informed decision, the Indian child, unless the request is made for the purpose of avoiding the application of WICWA and ICWA; (2) any extraordinary physical, mental, or emotional health needs of the Indian child requiring highly specialized treatment services as established by the testimony of an expert witness, including a qualified expert witness; and (3) the unavailability of a suitable placement for the Indian child after diligent efforts have been made to place the Indian child in the WICWA order of preference or the unavailability of a suitable agent to whom to delegate powers. The attorney should review specific applicable provisions. *See* [Wis. Stat. § 48.028\(7\)\(e\)1](#). The party requesting departure from the order of placement preference has the burden of establishing good cause for that departure. [Wis. Stat. § 48.028\(7\)\(e\)2](#).

VI. Termination of Parental Rights [§ 4.88]

A. Jurisdiction and Venue [§ 4.89]

TPR is the procedure by which all rights, powers, privileges, immunities, duties, and obligations existing between the parent and the child are permanently severed by a court order. [Wis. Stat. § 48.40\(2\)](#). The juvenile court has exclusive jurisdiction over TPR. [Wis. Stat. § 48.14\(1\)](#). Jurisdiction and venue requirements are set forth in [Wis. Stat. §§ 48.14\(1\) and 48.185\(2\)](#). In a voluntary consent to TPR proceeding under [Wis. Stat. § 48.41](#), venue is in the county where the birth parent or child resides when the petition is filed. [Wis. Stat. § 48.185\(2\)](#). In any juvenile court guardianship or TPR proceeding when the child has been placed outside the home under a CHIPS dispositional order, or any proceeding for guardianship under [Wis. Stat. § 48.977](#), venue is in the county where the dispositional order was issued, unless the child's county of residence has changed or the parent of the child has resided in a different Wisconsin county for six months. *Id.* In either case, the court may transfer the case, along with all appropriate records, to the county of residence of the child or parent, upon a motion before the court and for good cause shown. *Id.* In a post-termination proceeding, venue will be in the county where the TPR order was issued. [Wis. Stat. § 48.185\(5\)](#). For additional venue requirements specific to independent adoption, see section [4.113](#), *infra*.

B. Filing the Petition [§ 4.90]

[Wis. Stat.](#) §§ 48.25(1), 48.40(1), 48.42(1), and 48.835(3) govern the filing of the TPR petition. The TPR petition may be filed by a party, an agency, the district attorney, corporation counsel, the guardian ad litem or counsel for the child, a relative, a parent, a guardian, a relative with whom a party has placed the child for adoption, or any other appropriate person designated by the court.

C. Content of the Petition [§ 4.91]

At a minimum, the TPR petition must contain the child's name, birth date (or anticipated birth date), and address, along with the names and addresses of the parents, guardian, and legal custodian. [Wis. Stat.](#) § 48.42(1)(a), (b). In addition, the petition must state whether the child has been adopted, *see* [Wis. Stat.](#) § 48.42(1)(a), and it must provide the information required by the UCCJEA under [Wis. Stat.](#) § 822.29(1), *see* [Wis. Stat.](#) § 48.42(1)(bm). There must also be a statement that parental consent will be given voluntarily under [Wis. Stat.](#) § 48.41 or a statement of the statutory grounds under [Wis. Stat.](#) § 48.415 for involuntary TPR, along with the facts and circumstances that are alleged to establish these grounds. [Wis. Stat.](#) § 48.42(1)(c). Finally, the petition must include a statement of whether the child may be subject to ICWA. [Wis. Stat.](#) § 48.42(1)(d). If the child may be subject to ICWA, the petition must state the names of the child's Indian custodian, if any, and tribe, if known. *Id.* In addition, if the petition seeks the involuntary termination of parental rights to an Indian child, the petition must include reliable and credible information showing that (1) continued custody of the child by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child, and (2) active efforts have been made to prevent the breakup of the Indian child's family and those efforts have proved unsuccessful. [Wis. Stat.](#) § 48.42(1)(e). For further discussion of ICWA, see section [4.109](#), *infra*.

D. Notice and Service [§ 4.92]

In a TPR case, notice is of the utmost importance. Notice must be given to a number of individuals, such as the child's parents, including any alleged nonadjudicated fathers unless they have waived the right to notice; any person who has lived in a familial relationship with the child and may be the father; the child, if age 12 or older; the child's guardian, legal custodian, Indian custodian, and guardian ad litem; and any other person who must be given notice under [Wis. Stat.](#) ch. 822 (the UCCJEA). [Wis. Stat.](#) § 48.42(2). Notice must also be given to the child's foster parents or other physical custodian, [Wis. Stat.](#) § 48.42(2g)(a); however, [Wis. Stat.](#) § 48.42(2g)(b) provides that failure to provide such notice is not jurisdictional. In an involuntary TPR case involving a child whom the petitioner knows or has reason to know is an Indian child, the petitioner must serve the child's parent and Indian custodian pursuant to [Wis. Stat.](#) § 48.028(4)(a), and the petitioner must provide similar notice to the child's tribe of all hearings on the petition. *See* [Wis. Stat.](#) § 48.42(2g)(ag). Notice need not be given to a person who may be the child's father as a result of sexual assault if a physician attests to the physician's belief that sexual assault occurred, *see* [Wis. Stat.](#) §§ 940.225(1), (2), (3) (first-, second-, or third-degree sexual assault), 948.02(1), (2) (first- or second-degree sexual assault of child), 948.025 (repeated acts of sexual assault against same child), 948.085 (sexual assault of child placed in substitute care), or if the person who may be the child's father has been convicted of sexual assault for conduct that may have led to the child's conception. [Wis. Stat.](#) § 48.42(2m)(a). This exception from the TPR notice requirements does not apply, however, in cases of sexual assault of a child, [Wis. Stat.](#) § 948.02(1), (2), when the assailant was under age 18 at the time of the assault. [Wis. Stat.](#) § 48.42(2m)(a); *see also* *Ann M.M. v. Rob S. (In re Termination of Parental Rts. to Sue Ann A.M.)*, [176 Wis. 2d 673](#), [500 N.W.2d 649](#) (1993) (holding that notice need not be given to alleged birth father because child born to 15-year-old mother was considered to have been conceived as result of sexual assault of child under [Wis. Stat.](#) § 948.02).

In addition, a person who has filed an unrevoked declaration of paternal interest under [Wis. Stat.](#) § 48.025 may be entitled to notice of TPR proceedings involving a nonmarital child. *See* [Wis. Stat.](#) § 48.42(2)(b)1., (bm)1.

Note. [Wis. Stat.](#) § 48.42(2m)(b) alludes to the reasoning behind the relatively limited entitlement to notice in such cases:

A person who may be the father of a nonmarital child ..., by virtue of the fact that he has engaged in sexual intercourse with the mother of the child, is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.

For the person to be entitled to notice, the statutes require the declaration to be filed within specified time periods, *see, e.g.*, [Wis. Stat.](#) § 48.42(2)(b)1., (bm)1., and additional requirements apply when the child is younger than one year old. *See* [Wis. Stat.](#) § 48.42(2)(bm) (requiring mother to file affidavit under [Wis. Stat.](#) § 48.42(1g)(a), stating intent to terminate parental rights and identifying child's father). The guardian ad litem should ask the social worker or the representative of the licensed child welfare agency involved

in the case to contact the DCF to inquire whether a declaration of paternal interest has been filed and, if so, when. This person can then testify in this regard at the hearing.

The summons must contain the name and birth date (or anticipated birth date) of the child, as well as the nature, location, date, and time of the hearing, and must advise the party of the right to legal counsel, if applicable, and must advise the party of the consequences of a failure to respond or appear. [Wis. Stat. § 48.42\(3\)](#). The summons must notify parents that their parental rights may be terminated upon their failure to appear; that they have the right to have counsel present; and that if they contest the petition, they may request the appointment of a state public defender to represent them. [Wis. Stat. § 48.42\(4\)\(c\)1.–2](#). The summons must also give notice of the effect of a TPR order and, pursuant to [Wis. Stat. § 48.42\(3\)\(d\)](#), advise the parties that if the court terminates parental rights, a notice of intent to pursue postdisposition or appellate relief must be filed in the circuit court within 30 days after the order is entered. [Wis. Stat. § 48.42\(4\)\(c\)3.](#); *see also* [Wis. Stat. §§ 808.04\(7m\), 809.107\(2\)](#); *see infra* [§ 4.106](#). The information required in the summons must also be contained in the notice published pursuant to [Wis. Stat. § 48.42\(4\)\(b\)](#).

Personal service of the TPR summons and petition must be made on all interested parties, *see* [Wis. Stat. § 48.42\(2\)](#), if known, or notice must be published at least seven days (excluding weekends and holidays) before the hearing unless a party has voluntarily submitted to the court's jurisdiction or has waived the right to notice of the proceedings. [Wis. Stat. § 48.42\(4\)\(a\)](#). *But see* [Wis. Stat. § 48.42\(2g\)\(ag\)](#) (providing time periods applicable to Indian child). [Wis. Stat. § 801.15\(1\)\(b\)](#) requires that Saturdays, Sundays, and holidays be excluded when the time prescribed by statute is less than 11 days. Further, the day of service is excluded. The cautious approach is to provide 10 business days' notice.

Frequently in TPR cases a nonadjudicated father cannot be found for the purpose of personal service. Under such circumstances, constructive notice must be given. *See* [Wis. Stat. § 48.42\(4\)\(b\)](#). Service by publication is appropriate if, with reasonable diligence, an interested party cannot be served personally and the child is a nonmarital child who is not subsequently legitimated or adopted and paternity has not yet been acknowledged or adjudicated, or when the child was relinquished under [Wis. Stat. § 48.195](#). *Id.* The requirements for the form of notice are set forth in [Wis. Stat. § 48.42\(4\)\(b\), \(c\)](#), and [Wis. Stat. ch. 985](#). At the fact-finding hearing, the party who published must provide proof that the notice was published at least seven days (excluding weekends and holidays) before the hearing. *See* [Wis. Stat. § 985.12](#).

[Wis. Stat. §§ 48.42\(4\)\(b\)3. and 48.422\(6\)\(b\)](#) permit the petitioner to request a court order waiving the requirement of constructive notice to a person who, although his identity is unknown, may be the father of a nonmarital child. The issuance of a *capias* is also appropriate in cases in which a summons cannot be served, the party served fails to obey the summons, or it appears to the court that service will be ineffectual. [Wis. Stat. § 48.28](#).

Practice Tip. A guardian ad litem in a termination-of-parental-rights case should verify that any potential father of a child is given proper notice of the case. The petitioner should be able to provide a list of any potential fathers and any potential attempts at contact.

E. Preadjudication [§ 4.93]

1. Right to Counsel [§ 4.94]

[Wis. Stat. §§ 48.23 and 48.235](#) set forth the parents' and the child's general right to representation in TPR proceedings. A guardian ad litem must be appointed to represent the best interests of any child who is the subject of a TPR proceeding, whether voluntary or involuntary (including the terminations held before a stepparent adoption), or a contested adoption. [Wis. Stat. § 48.235\(1\)\(c\)](#). A guardian ad litem must also be appointed for an incompetent parent, pursuant to [Wis. Stat. § 48.235\(1\)\(g\)](#). In addition, an involuntary TPR proceeding or a contested adoption requires appointment of advocacy counsel for a minor birth parent. [Wis. Stat. § 48.23\(2\)](#). A guardian ad litem, however, must be appointed for a minor birth parent petitioning for a voluntary TPR. [Wis. Stat. § 48.235\(1\)\(b\)](#). The statutes set forth specific responsibilities for the guardian ad litem appointed to represent the best interests of a minor parent whose parental rights are the subject of a voluntary TPR proceeding. [Wis. Stat. § 48.235\(5\)](#). The guardian ad litem must interview the minor parent, investigate the reason for the termination of parental rights, assess the voluntariness of the consent, and inform the minor parent of the parent's rights and of the alternatives to, and the effect of, termination of parental rights. *Id.*

Note. [Wis. Stat. § 48.23\(2\)\(b\)3.](#) addresses the right to counsel and to appear by counsel as it relates to violations of orders to appear in person for hearings on petitions for involuntary TPR. [Wis. Stat. § 48.23\(2\)\(b\)3.](#) provides that an adult respondent

parent's violation of a court order to appear in person, if egregious and without justifiable excuse, presumptively waives the parent's right to counsel and to appear by counsel. The Wisconsin Supreme Court has addressed the procedure for granting a default judgment in the grounds phase of a TPR proceeding as a sanction against parents who fail to appear. *See, e.g., Dane Cnty. Dep't of Hum. Servs. v. Mable K. (In re Termination of Parental Rts. to Isaiah H.)*, [2013 WI 28](#), [346 Wis. 2d 396](#), [828 N.W.2d 198](#). When corporation counsel or the district attorney requests a routine order for a parent to appear in all TPR proceedings, the guardian ad litem evaluates in the context of the child's best interest whether the parent's conduct is egregious and without justifiable excuse.

In any voluntary TPR proceeding, if a guardian ad litem has reason to doubt the capacity of a birth parent to give informed and voluntary consent, the guardian ad litem must inform the court. [Wis. Stat.](#) § 48.41(3). The court must then inquire into the parent's capacity to consent and must make appropriate findings. *Id.* If the court finds the birth parent incapable of consenting knowingly and voluntarily, it must dismiss the case. *Id.* The guardian ad litem need not join in the birth parent's consent nor may the guardian ad litem's judgment be substituted for that of the parent. *See id.* If a voluntary TPR petition is dismissed, the birth parent's rights can still be terminated involuntarily. *Id.*

2. Status Conference [§ 4.95]

The requirements of [Wis. Stat.](#) § 48.315 regarding delays, continuances, and extensions apply to all TPR proceedings, as well as to other proceedings under the Children's Code. Because of the various statutory time periods that apply after the filing of the petition, it is often appropriate for the guardian ad litem to schedule a status conference with the court approximately 10 days after the filing of the petition. At the status conference, counsel and the judge can discuss the scheduling of the fact-finding hearing. They can also address any problems relating to discovery or representation by counsel; notice to parties, especially nonadjudicated fathers; and concerns relating to paternity. If the guardian ad litem thinks that psychological evaluations may be necessary before trial, a motion requesting such psychological evaluations should be filed when the petition is filed. This motion can be decided by the court soon after the filing of the petition, logically at the status conference, so that there need be no delay in scheduling the trial because the psychological evaluations have not been completed.

Practice Tip. The status conference is not required by statute. It is good practice, however, to schedule one, because the status conference indicates to the parties and their counsel that the guardian ad litem is serious about proceeding. It also provides a mechanism for eliminating any problems that might cause delay in proceeding to trial, and it may facilitate the parents' consent to termination of parental rights.

3. Discovery and Pretrial Motions [§ 4.96]

[Wis. Stat.](#) §§ 48.293, 48.295, and 48.297 set forth the provisions for discovery, pretrial motions, and physical, psychological, mental, or developmental examinations. Except for a guardian ad litem appointed under [Wis. Stat.](#) § 48.235(1)(g) to represent an incompetent parent, *see* [Wis. Stat.](#) § 48.235(5m), the guardian ad litem has available all the methods of civil discovery under [Wis. Stat.](#) ch. 804, including interrogatories, requests for production of documents, requests to admit, and depositions. *See* [Wis. Stat.](#) § 48.293(4).

Practice Tip. Requests to admit may be particularly effective if they are carefully drafted to elicit admissions to the grounds for involuntary TPR set forth in [Wis. Stat.](#) § 48.415. Requests to admit should be prepared contemporaneously with interrogatories designed to discover every reason why any requested admission was denied. Under [Wis. Stat.](#) § 804.11(1)(b) and (2), any requested admission that is not responded to within 30 days is deemed admitted and is admissible as evidence at trial, unless the court on motion permits withdrawal or amendment of the admission. Because of the time periods in TPR cases, the attorney submitting interrogatories, demands for production, or requests to admit may need to obtain a court order shortening the time for the responding party to answer or produce.

The juvenile court must make a threshold relevance determination by an in camera review when confronted with (1) a discovery request under [Wis. Stat.](#) § 48.293(2), (2) an inspection request of juvenile records under [Wis. Stat.](#) §§ 48.396(2) and 938.396(2), or (3) an inspection request of agency records under [Wis. Stat.](#) §§ 48.78(2)(a) and 938.78(2)(a). *Courtney F. v. Ramiro M.C. (In re Termination of Parental Rts. to Caleb J.F.)*, [2004 WI App 36](#), ¶ 21, [269 Wis. 2d 709](#), [676 N.W.2d 545](#)

Note. The test for permissible discovery is whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* ¶ 23; *see also* [Wis. Stat.](#) § 48.78 (confidentiality of records).

F. Initial Hearing [§ 4.97]

Caution. Different time periods may apply if the case involves an Indian child. *See* [Wis. Stat.](#) § 48.42(2g)(ag).

Under [Wis. Stat.](#) § 48.422(1), the hearing on the TPR petition must be held within 30 days after the petition is filed. The purpose of this hearing is to determine whether any party wishes to contest the TPR petition. The court must inform the parties, on the record, of their right to a jury trial. [Wis. Stat.](#) § 48.422(1). Any party's request for jury trial must be made before the end of the initial hearing, [Wis. Stat.](#) § 48.422(4), although nonpetitioning, unrepresented parties must be granted a continuance to consult with an attorney regarding the request for a jury trial or a substitution of judge. [Wis. Stat.](#) § 48.422(5).

Practice Tip. It is good practice to have the record reflect the parent's awareness of the parent's right to a substitution of judge because doing so insulates the record from a challenge based on ineffective assistance of counsel.

Note. Neither the federal or state constitutions nor [Wis. Stat.](#) § 48.422 mandates that a parent's waiver of the right to a jury trial on the grounds for termination must be on the record during a personal colloquy with the judge. The benchmark is whether the record made clear that the parent knowingly, intelligently, and voluntarily waived that right. *Racine Cnty. Hum. Servs. Dep't v. Latanya D.K. (In re Termination of Parental Rts. to Keylen D.K.)*, [2013 WI App 28](#), ¶ 21, [346 Wis. 2d 75](#), [828 N.W.2d 251](#).

Under [Wis. Stat.](#) § 48.423(1), if any person appears at the initial hearing and claims to be the father of the child, the court must hold a hearing on the issue of paternity, or, if the parties agree, the court may hear testimony immediately, and the person claiming to be the father must prove paternity by clear and convincing evidence. [Wis. Stat.](#) § 48.423(1). *See also* [Wis. Stat.](#) § 48.423(2) for additional requirements for out-of-state fathers of nonmarital children who wish to participate in the TPR proceedings.

If any party contests the TPR petition at the initial hearing, the court must set a fact-finding hearing to be held within 45 days. [Wis. Stat.](#) § 48.422(2). This fact-finding hearing will be to the bench or to a jury if one has been requested. If the petition is not contested at the initial hearing, the court may proceed immediately to hear testimony in support of the allegations in the petition, [Wis. Stat.](#) § 48.422(3), and may terminate parental rights.

If a parent is timely served with a notice of the plea hearing (and the notice advises the parent that a failure to appear may result in the entry of a finding of TPR grounds by default), and the parent thereafter fails to appear, a default finding of TPR grounds may be obtained. *See Dane Cnty. Dep't of Hum. Servs. v. Angela M.L. (In re Termination of Parental Rts. to Armond L.)*, Nos. [2008AP237](#), [2008AP238](#), 2008 WL 1745587 (Wis. Ct. App. Apr. 17, 2008) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). Brief testimony to support the finding of grounds should be taken.

G. Hearing on the Petition for Voluntary Termination of Parental Rights [§ 4.98]

When the parents voluntarily consent to the termination of their parental rights, the role of the child's guardian ad litem is clear. First, the guardian ad litem must ensure that a sufficient record is made. This record must be appeal-proof to protect the child against further disruption in the child's life by a change in placement ordered on appeal. Second, the guardian ad litem should be prepared to take a position on whether TPR is in the child's best interest.

Under [Wis. Stat.](#) § 48.41(3), if a guardian ad litem doubts a birth parent's ability to give informed and voluntary consent to a voluntary termination of parental rights, the guardian ad litem must so inform the court. If the court finds the person incapable of giving informed and voluntary consent to the termination, the court must dismiss the proceeding. [Wis. Stat.](#) § 48.41(3). If appropriate, however, a proceeding may be commenced for involuntary TPR.

When a parent requests a voluntary TPR, the judge must explain to the parent, who appears personally in court, the effect of TPR. [Wis. Stat.](#) § 48.41(2)(a). The judge must also question the parent regarding whether the consent is informed and voluntary. *Id.* If the parent or custodian falls within the scope of ICWA and WICWA, the court must certify that the parent understood the English explanation or that it was interpreted into the appropriate language. [Wis. Stat.](#) §§ 48.028(5)(b), 48.41(2)(e); *see also* 25 [U.S.C.](#) § 1913(a). At a minimum, the court must use open-ended questions to determine, on the record, the following: (1) the extent of the

parent's education and level of general comprehension; (2) the parent's understanding of the nature of the proceedings and the consequences of TPR, including the finality of the parent's decision and of the court order; (3) whether the parent is aware of the rights and responsibilities being given up; (4) the parent's understanding of the guardian ad litem's role and the right to retain counsel; (5) the extent and nature of the parent's communication with the guardian ad litem, the parent's attorney, the social worker, or any other adviser; (6) whether any promises or threats were made to the parent in connection with the termination of parental rights; and (7) whether the parent is aware of the significant alternatives to TPR and what those alternatives are. See *T.M.F. v. Children's Serv. Soc'y of Wis. (In the Int. of D.L.S.)*, [112 Wis. 2d 180](#), 196–97, [332 N.W.2d 293](#) (1983). Failure to provide these explanations will endanger the validity of the voluntary termination of parental rights. See *Oneida Cnty. Dep't of Soc. Servs. v. Therese S. (In re Termination of Parental Rts. to Yasmine B.)*, [2008 WI App 159](#), ¶ 17, [314 Wis. 2d 493](#), [762 N.W.2d 122](#) (comparing voluntary consent standard under [Wis. Stat. § 48.41](#) with standard for no-contest plea under [Wis. Stat. § 48.422\(7\)](#)). [Wis. Stat. § 48.41](#) with standard for no-contest plea under [Wis. Stat. § 48.422\(7\)](#).

Comment. When examining the voluntariness of consent to terminate parental rights, the court of appeals found that having a provision in a nonprosecution agreement requiring defendants to voluntarily terminate their parental rights as a condition of the agreement did not violate public policy and could be allowed. *State v. Rippentrop*, [2023 WI App 15](#), [406 Wis. 2d 692](#), [987 N.W.2d 801](#) (review denied).

The court should also determine whether the parent wishes the child to be placed with adoptive parents of the same religion as the birth parent's religion. See [Wis. Stat. § 48.82\(3\)](#). This preference is to be followed by the guardian agency if practicable. Finally, the judge must ensure that the appointment of the guardian ad litem for the minor birth parent allowed the guardian ad litem sufficient time to make a full and adequate investigation of the alternatives. [Wis. Stat. § 48.41\(2\)\(a\)](#) permits attorneys representing any party to the proceeding to question the parent regarding whether the parent's consent is informed and voluntary.

Practice Tip. The information to be elicited by the court, as required by [Wis. Stat. § 48.41](#) and the case law, is a bare minimum. Numerous additional questions should be asked for the record to be complete. The birth parent should answer in complete sentences, not merely with “yes” or “no” responses. For information about what to ask at the voluntary TPR hearing, see Matthew W. Giesfeldt, *Termination of Parental Rights and Adoption* (State Bar of Wis. 4th ed. 2024). The guardian ad litem should supplement these questions with questions relating to the specific case and should delete those questions that are not appropriate. Above all, to represent the child's best interests, the guardian ad litem must protect the TPR record by ensuring that it reflects the knowing and voluntary decision to voluntarily terminate parental rights.

A parent's voluntary consent to TPR may be given in several ways. See [Wis. Stat. § 48.41\(2\)\(b\)–\(d\)](#). [Wis. Stat. § 48.41\(2\)\(b\)1.](#) provides that if the court having jurisdiction over the TPR proceeding finds that it would be difficult or impossible for a parent to appear in person before that court, the parent may appear before a judge of any court of record in another jurisdiction and sign a written consent. The parent's written consent must be accompanied by the judge's signed findings that the judge explained to the parent the effects of TPR and that the judge questioned the parent regarding whether the consent was voluntary and informed. [Wis. Stat. § 48.41\(2\)\(b\)1.](#) If the child is an Indian child, the judge must certify that the parent or custodian understood the explanation in English or that the explanation was interpreted into the parent's native language. [Wis. Stat. §§ 48.028\(5\)\(b\), 48.41\(2\)\(e\)](#); see also 25 [U.S.C. § 1913\(a\)](#). [Wis. Stat. § 48.41\(2\)\(b\)2.](#) provides another procedure for when the court with jurisdiction determines that it would be difficult or impossible for a parent to appear before that court: if the parent requests, and unless good cause to the contrary is shown, the court may admit testimony on the record by telephone or live audiovisual means. See [Wis. Stat. § 807.13\(2\)](#).

A putative but nonadjudicated father of a nonmarital child who does not wish to appear before a judge may consent by signing a written, notarized statement. [Wis. Stat. § 48.41\(2\)\(c\)](#). This statement must recite that the alleged father has been informed of and understands the effect of TPR, that he voluntarily disclaims any rights, and that he voluntarily waives any right to notice of the TPR proceedings. *Id.* This voluntary consent may be presented to the judge at the TPR hearing without the alleged father's presence. The judge may accept the consent as informed and voluntary and may terminate the alleged father's parental rights based on this acceptance.

If the petitioner is a stepparent intending to adopt the child, the child's birth parent may consent to TPR by filing an affidavit, witnessed by two persons, stating that the parent has been informed of and understands the effect of TPR and voluntarily disclaims the right to notice of the TPR proceedings. [Wis. Stat. § 48.41\(2\)\(d\)](#). In these cases, however, it is good practice to provide notice to the consenting parent notwithstanding the disclaimer of the right to notice of proceedings. Before proceeding to the adoption hearing, the judge in whose court the TPR hearing is held may accept the birth parent's consent to TPR without the birth parent's presence.

When the voluntary consent is given in any of the above circumstances, the judge may proceed immediately to disposition. [Wis. Stat. § 48.41\(1\)](#).

The statutes facilitate written consent by parents not residing in the United States (for example, military personnel stationed overseas). [Wis. Stat. § 48.41\(2\)\(b\)1](#). provides that consent may be notarized by an embassy or consul official or a military judge in another state, country, or foreign jurisdiction. A parent who is a resident of a foreign jurisdiction may consent by filing an affidavit, witnessed by two persons, that states that the parent has been informed of and understands the parent's rights and that the parent voluntarily disclaims the parent's rights to the child, including the right to notice of the proceedings. [Wis. Stat. § 48.41\(2\)\(d\)](#). If a parent is a member of the U.S. armed services, the provisions of the Servicemembers Civil Relief Act, 50 [U.S.C. §§ 3901–4043](#), must be complied with. The Act is specific in its requirements, but it is not difficult to implement.

At the hearing, the guardian ad litem should also ensure that the birth mother's testimony with respect to the child's paternity is complete and accurate. The guardian ad litem should determine whether any person has timely filed a declaration of paternal interest and, if so, who that person is and what his rights are. The guardian ad litem should ensure that the judge attempt to ascertain the child's paternity and determine whether all possible birth fathers, known or unknown, have been properly served. If any known, interested parties have not been notified, the guardian ad litem should ask the judge to adjourn the hearing and order that appropriate notice be given. If an unknown person may be the child's father and notice to that person is required and has not been waived, the guardian ad litem should ask the court to determine whether constructive notice will substantially increase the likelihood of notice to that person. If the court determines that constructive notice would substantially increase the likelihood of notice and notice has not already been published or if the court determines that the publication used was not sufficient, the court must adjourn the hearing for a period not to exceed 30 days and order that constructive notice be given. [Wis. Stat. § 48.422\(6\)\(b\)](#). If the court determines that constructive notice will not substantially increase the likelihood of notice, the court must order that the hearing proceed. *Id.*

The requirements for disposition are set forth in [Wis. Stat. §§ 48.425, 48.426, 48.427, 48.43, 48.432, and 48.433](#). The standards and factors to be considered by the court, the possible dispositions, and the resulting court order are discussed in detail in sections [4.99–105](#), *infra*.

H. Summary Judgment [§ 4.99]

Under certain circumstances, partial summary judgment may be available to resolve the fact-finding phase of the proceedings. In *Steven V. v. Kelley H. (In re Termination of Parental Rights to Alexander V.)*, [2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856](#), the Wisconsin Supreme Court concluded that, assuming that the court orders or judgments on which the petition is based indeed exist, partial summary judgment may be appropriately granted when grounds are alleged under [Wis. Stat. § 48.415\(1m\)](#) (relinquishment), 48.415(4) (continuing denial of periods of physical placement or visitation), 48.415(8) (homicide or solicitation to commit homicide of parent), 48.415(9) (parenthood as a result of sexual assault), 48.415(9m) (commission of felony against child), or 48.415(10) (prior involuntary termination of parental rights to another child). The court reasoned that these statutory grounds for unfitness “are expressly provable by official documentary evidence.” *Id.* ¶ 37.

Note. Summary judgment is *not* appropriate for purposes of disposition. If a parent denies that it is in the child's best interest to terminate parental rights, a hearing is necessary.

The court in *Steven V.* also noted that, ordinarily, summary judgment is inappropriate in fact-intensive allegations under [Wis. Stat. § 48.415\(1\)](#) (abandonment), 48.415(2) (child in continuing need of protection or services), 48.415(3) (continuing parental disability), 48.415(5) (child abuse), 48.415(6) (failure to assume parental responsibility), or 48.415(7) (incestuous parenthood). *Id.* ¶ 36. Even in this latter category of cases, however, partial summary judgment might be appropriately granted if the parent admits to facts sufficient to establish grounds and denies facts that contradict those grounds.

Note. Under [Wis. Stat. § 48.415\(8\)](#), homicide or solicitation to commit homicide of a parent, the fact of conviction, as evidenced by the final judgment of conviction in the underlying criminal proceeding, is conclusive in establishing the ground for TPR. Whether the conviction resulted from a trial, a guilty plea, or a no-contest plea, the judgment of conviction is admissible and determinative. See *Lee v. State Bd. of Dental Exam'rs*, [29 Wis. 2d 330, 335, 139 N.W.2d 61](#) (1966). The term “conviction” as used in [Wis. Stat. § 48.415\(5\)\(a\)](#), child abuse, means a conviction after the appeal as of right has been exhausted, and the appeal as of right is limited to the right to appeal to the court of appeals. *Monroe Cnty. v. Jennifer V. (In the Int. of Kody D.V.)*, [200 Wis. 2d 678, 690–91, 548 N.W.2d 837](#) (Ct. App. 1996). *Id.* It is crucial that the party moving for summary judgment under [Wis. Stat.](#)

§ 48.415(8) ascertain with certainty that all postconviction remedies in the court of appeals are exhausted and the right to direct appeal has not been restored.

Note. A conviction as a party to the crime for child neglect, resulting in the death of a parent's child, qualifies as a serious felony under [Wis. Stat. § 48.415\(9m\)](#) as long as the parent directly committed that offense. *Brown Cnty. Dep't of Hum. Servs. v. S.K. (In re Termination of Parental Rts. to R.M.)*, [2023 WI App 27](#), [407 Wis. 2d 893](#), [992 N.W.2d 208](#). While this is ground is typically a paper ground (i.e., capable of being proved by only documentary evidence and thus suitable for resolution on summary judgment), the petitioner's partial summary-judgment motion will need to include information that the parent directly committed the offense of child neglect resulting in death. Thus, the petitioner can still possibly prove direct commission of the offense with information from the criminal case and accompanying affidavits.

A motion for summary judgment in the grounds phase of the proceedings can be brought any time before trial and need not be filed within the eight months after filing the summons and complaint otherwise provided by the rules of civil procedure under [Wis. Stat. § 802.08\(1\)](#). [Wis. Stat. § 48.297\(1\)–\(2\)](#) allows for any motion capable of being determined without trial to be brought any time before trial, including a motion for summary judgment in a termination-of-parental-rights case. *Brown Cnty. Dep't of Health & Hum. Servs. v. T.R. (In re Termination of Parental Rts. to A.P.)*, No. [2022AP1094](#), 2023 WL 328466 (Wis. Ct. App. Jan. 20, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (review denied).

I. Fact-Finding Hearing for Contested Petition [§ 4.100]

Within 45 days after the initial TPR hearing, the court must conduct a fact-finding hearing during which the judge or jury determines whether grounds exist, pursuant to [Wis. Stat. § 48.415](#), for the involuntary TPR of one or both parents. [Wis. Stat. § 48.422\(2\)](#). *But see* [Wis. Stat. § 48.42\(2g\)\(ag\)](#) (providing periods applicable to Indian child). At the fact-finding hearing, the court must determine whether one of the statutory grounds for termination of parental rights exists: (1) abandonment; (2) relinquishment; (3) continuing need of protection or services; (4) continuing parental disability; (5) continuing denial of periods of physical placement; (6) child abuse; (7) failure to assume parental responsibility; (8) incestuous parenthood; (9) intentional homicide (or solicitation to commit homicide) of a parent; (10) parenthood as a result of a sexual assault; (11) commission of a felony against a child; or (12) prior involuntary TPR. [Wis. Stat. § 48.415\(1\)–\(10\)](#).

The general provisions for the fact-finding hearing are set forth in [Wis. Stat. § 48.424](#). The judge or jury must determine whether the petitioner has proved the allegations of the TPR petition by clear and convincing evidence. *See* [Wis. Stat. §§ 48.424\(2\), 48.31\(1\)](#). For Indian children, the burden of proof is beyond a reasonable doubt. [Wis. Stat. § 48.028\(4\)\(e\)1](#). (providing that court must not order involuntary TPR to an Indian child unless “court or jury finds beyond a reasonable doubt ... that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”); 25 [U.S.C. § 1912\(f\)](#) (same). Also in a case involving an Indian child, the court or jury must find “by clear and convincing evidence that active efforts ... have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child’s family and that those efforts have proved unsuccessful.” [Wis. Stat. § 48.028\(4\)\(e\)2](#); *see also* [Wis. Stat. § 48.415](#) (requiring that court or jury make findings under [Wis. Stat. § 48.028\(4\)\(e\)1](#). and 2.). The civil rules regarding jury selection and the rules of evidence apply to fact-finding hearings. The fact-finder, whether judge or jury, does not consider the best interests of the child at this stage in the proceedings. The fact-finder may decide only whether grounds for the termination of parental rights have been proved. The court must later decide what disposition is in the best interests of the child; even if grounds have been found, the court need not terminate parental rights. The dispositional alternatives available to the court are discussed in sections [4.104–105](#), *infra*.

To establish a continuing need for protection or services under [Wis. Stat. § 48.415\(2\)\(a\)3](#)., the CHIPS petition, dispositional and subsequent orders, and sometimes transcripts of the proceedings must be used to show that the child has been placed outside the parental home for a cumulative period of at least six months. The petitioner must prove that the parent has failed to meet the conditions established for the safe return of the child to the home. [Wis. Stat. § 48.415\(2\)\(a\)3](#). This emphasizes the importance of crafting very specific dispositional requirements in a CHIPS order for parents to meet. It is generally considered good practice for the guardian ad litem, the social worker, and the district attorney or corporation counsel to meet two or three months before the termination of the CHIPS dispositional order to discuss whether the filing of a TPR petition would be in the child’s best interest. If the guardian ad litem concludes that a petition will likely need to be filed, the guardian ad litem should begin to organize and prepare the file for trial. *See Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, [124 Wis. 2d 47](#), 61–70, [368 N.W.2d 47](#) (1985) (holding that guardian ad litem has right to prepare for and participate in fact-finding hearing).

In preparing for the fact-finding hearing, whether before the judge or a jury, the guardian ad litem must rely on civil litigation skills. There may be the need for extensive discovery with respect to the involvement of social workers, foster parents, family members, and other persons in the life of the child and the parents. Law enforcement officers may need to be interviewed and deposed as well. Ultimately, the guardian ad litem is responsible for representing the best interests of the child. If the guardian ad litem determines that the child's best interests would be served by the termination of parental rights, the guardian ad litem should proceed vigorously toward that end. If the fact-finding hearing is to a jury, the guardian ad litem or the court may tell the jury that the guardian ad litem represents the interests of the child. [Wis. Stat.](#) § 48.235(6). The term "best interests," however, is not to be used. *C.E.W.*, 124 Wis. 2d at 70.

When appointed for a child in a TPR case, the guardian ad litem is entitled to participate in voir dire; share the challenges to the jury with the district attorney or corporation counsel; deliver an opening statement; call, question, and cross-examine witnesses; and present a closing argument. The guardian ad litem's failure to prepare for or participate fully in the fact-finding hearing would be a clear disservice to the child.

Note. If the court finds a parent in default for a nonappearance and finds the parent's conduct to be egregious and without clear and justifiable excuse, regardless of whether counsel is discharged or continues representation, the court's findings trigger the two-day waiting period to have the dispositional hearing under [Wis. Stat.](#) § 48.23(2)(b)3. The guardian ad litem should make sure the court honors this waiting period to retain its competency to conduct the dispositional hearing. *See State v. R.A.M. (In re Termination of Parental Rts. to P.M.)*, [2024 WI 26](#), ¶ 1, [412 Wis. 2d 285](#), [8 N.W.3d 349](#) (remanding to circuit court for new dispositional hearing when court failed to wait two days after parent's nonappearance before holding first dispositional hearing).

J. Parental Unfitness [§ 4.101]

The court must find parental unfitness before TPR may be ordered. *Mrs. R. v. Mr. B. (In the Int. of J.L.W.)*, [102 Wis. 2d 118](#), 136, [306 N.W.2d 46](#) (1981). To support a finding of unfitness, it must be clear that

[The parent] has so conducted himself, or shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, *but essential to their safety or to their welfare*, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with.

R.D.K. v. Sheboygan Cnty. Soc. Servs. Dep't (In re Termination of Parental Rts. to A.M.K.), [105 Wis. 2d 91](#), 102, [312 N.W.2d 840](#) (Ct. App. 1981) (citing *Lemmin v. Lorfeld*, [107 Wis. 264](#), 266, [83 N.W. 359](#), 360 (1900)) (emphasis added by court of appeals).

The court also stated that "a finding of unfitness is a determination that further contact between parent and child will be seriously detrimental to the child" and that "once unfitness has been found, alternatives which would continue parental rights are rendered moot." *Id.*

If the judge or the jury has determined that grounds exist for termination of parental rights, the judge must find the parent unfit. [Wis. Stat.](#) § 48.424(4). The finding of unfitness does not require TPR but merely gives the court the right to proceed if TPR would be in the best interest of the child. *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re Termination of Parental Rts. to Prestin T.B.)*, [2002 WI 95](#), ¶¶ 5, 26, 39, [255 Wis. 2d 170](#), [648 N.W.2d 402](#) (holding that if TPR grounds not proved at close of fact-finding hearing, then petition dismissed; if, however, grounds are proved and court finds unfitness, then court should not dismiss petition unless in child's best interests).

In most cases, once grounds for termination are proved and a finding of unfitness is made, the court may proceed immediately to hear evidence and motions relating to disposition. [Wis. Stat.](#) § 48.424(4). [Wis. Stat.](#) § 48.23(2)(b)3., however, provides that a parent 18 years of age or older is presumed to have waived the parent's right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings, the parent fails to appear in person as ordered, and the court finds that the parent's conduct was egregious and without clear and justifiable excuse. It is presumed that failure by the parent to appear in person at consecutive hearings as ordered is egregious conduct without clear and justifiable excuse. *Id.* Upon finding that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court cannot hold a dispositional hearing on a contested adoption or involuntary termination of parental rights until at least two days after the date of that finding. *Id.* The court may delay the dispositional hearing for up to 45 days after the fact-finding hearing if all parties agree or if the court report has not been received and the court directs the agency to prepare the report. [Wis. Stat.](#) § 48.424(4). The court may transfer temporary

custody of the child to the agency during the 45-day period between the fact-finding hearing and the dispositional hearing. [Wis. Stat. § 48.424\(5\)](#). *But see* [Wis. Stat. § 48.42\(2g\)\(ag\)](#) (time periods applicable to Indian child).

K. Court Report [§ 4.102]

Under [Wis. Stat. § 48.425](#), a court report is required when the TPR petition is filed by an agency or when ordered by the court. Under [Wis. Stat. § 48.425\(1\)](#), the court report must contain various items, including the following: (1) the child's social history; (2) the child's medical record; and (3) a statement of the facts supporting the need for TPR. If the child was previously adjudged in need of protection or services the report must also contain a statement of the steps taken by the agency to remedy the conditions responsible for court intervention, and a description of the parent's response to and cooperation with the services. [Wis. Stat. § 48.425\(1\)\(c\)](#). If the child was removed from the home, the report must include (1) a statement of the reasons why the child cannot safely return to the family, if the child has been removed from the home; and (2) the steps taken by the agency to effect a safe return home. *Id.* If a permanency plan has previously been prepared for a child, the court report must include specific information showing that the responsible agency has made reasonable efforts to achieve the goal of the permanency plan, including, if appropriate, through an out-of-state placement. *Id.*

Furthermore, the court report must contain statements about the following: (1) other appropriate services, if any, that might allow a safe return home, [Wis. Stat. § 48.425\(1\)\(d\)](#); (2) application of the standard and factors for disposition of the case, [Wis. Stat. § 48.425\(1\)\(e\)](#); *see* [Wis. Stat. § 48.426\(2\)](#), (3); and, (3) the likelihood of adoption, if the report recommends termination of parental rights, [Wis. Stat. § 48.425\(1\)\(f\)](#). If the agency determines that adoption is unlikely or not in the child's best interest, the report must include a plan for placing the child in a permanent family setting and it must either name an appropriate agency to be guardian for the child or recommend a guardian under [Wis. Stat. § 48.977\(2\)](#). [Wis. Stat. § 48.425\(1\)\(g\)](#); *see also supra* § 4.65 ([Wis. Stat. § 48.977](#) guardianships). The agency must prepare the child's medical record within 60 days after the filing of the petition. [Wis. Stat. § 48.425\(1m\)](#). For additional information required in the case of involuntary TPR to an Indian child, *see* [Wis. Stat. § 48.425\(1\)\(cm\)](#).

[Wis. Stat. § 48.422\(9\)\(a\)](#) permits the court to waive the court report if the petition was filed by any person other than an agency, but the court must order the birth parents to provide the court with the medical-record information. If the birth parents do not comply with the court order, the court must require the health-care providers known to have provided care to the parents to send the court any health-care records of the parents relevant to the child's medical condition or genetic history. [Wis. Stat. § 48.422\(9\)\(b\)](#). Any court order for the release of the child's or parents' alcohol or drug abuse records is subject to federal regulations concerning confidentiality. *See* 42 [U.S.C. § 290dd-2](#); 42 [C.F.R.](#) pt. 2.

L. Disposition [§ 4.103]

1. Hearing [§ 4.104]

If the parent voluntarily consents to TPR under [Wis. Stat. § 48.41](#) or if the judge or jury finds that grounds exist under [Wis. Stat. § 48.415](#) for the involuntary TPR, and upon a finding of parental unfitness, the court may proceed to the dispositional hearing, held under [Wis. Stat. § 48.427](#). In most cases, the court may proceed immediately to the dispositional hearing or may delay the dispositional hearing for up to 45 days after the fact-finding hearing if all parties agree or if the court report has not been received and the court directs the agency to prepare the report. [Wis. Stat. § 48.424\(4\)](#). *But see* [Wis. Stat. § 48.23\(2\)\(b\)3](#). (providing that if court finds that parent's conduct by failing to appear in person at hearing as ordered was egregious and without clear and justifiable excuse, then court cannot hold dispositional hearing on contested adoption or termination of parental rights until at least two days after date of that finding). At the hearing, the court must hear relevant testimony offered by the parties, including expert testimony. [Wis. Stat. § 48.427\(1\)](#). The court must admit testimony having reasonable probative value and exclude immaterial, irrelevant, or unduly repetitious testimony. [Wis. Stat. § 48.299\(4\)\(b\)](#). The court must give effect to rules of privilege recognized by law and apply basic principles of relevance, materiality, and probative value to proof of all questions of fact. *Id.* The record must note objections to evidentiary offers and to offers of proof of evidence that are not admitted. *Id.* The court may admit hearsay evidence if it has demonstrable circumstantial guarantees of trustworthiness. *Id.* In addition, the guardian ad litem may call as witnesses any persons who have had a substantial relationship with the child. *David S. v. Laura S. (In the Int. of Brandon S.S.)*, 179 Wis. 2d 114, 507 N.W.2d 94 (1993). Neither common-law nor statutory rules of evidence are binding at the dispositional hearing. [Wis. Stat. § 48.299\(4\)\(b\)](#).

Under [Wis. Stat. § 48.426\(1\)](#), the court must consider any court report submitted by an agency. In making a determination as to disposition, the standard is the best interests of the child. [Wis. Stat. § 48.426\(2\)](#). A compelling state interest is not required. The court

must also consider the following factors: (1) the likelihood of the child's adoption after the termination of parental rights; (2) the child's age and health at the time of the disposition and, if applicable, at the time the child was removed from the home; (3) whether the child has substantial relationships with the parents or other family members and whether it would be harmful to the child to sever these relationships; (4) the wishes of the child; (5) if appropriate, the duration of the separation of the parents from the child; and (6) whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements. [Wis. Stat.](#) § 48.426(3).

Comment. There is no set burden of proof required for a dispositional hearing. The Wisconsin Supreme Court confirmed that the statutory standard for the dispositional phase of the case is the best interest of the child, but the majority opinion declined to determine whether the "clear and convincing" burden of proof follows to the second phase of a TPR, as some of the trial rights do. *State v. B.W. (In re Termination of Parental Rts. to B.W.)*, [2024 WI 28](#), ¶ 6 n.4, [412 Wis. 2d 364](#), [8 N.W.3d 22](#).

[Wis. Stat.](#) § 48.427(2) provides that upon reviewing the evidence, the court may dismiss the petition if it thinks that TPR is not warranted, and [Wis. Stat.](#) § 48.43(1) requires the court to state in the order the reasons for dismissal. The court may enter an order terminating the rights of one or both parents so that the child may be adopted. [Wis. Stat.](#) § 48.427(3). According to [Wis. Stat.](#) § 48.427(3m), if the rights of both parents or of the only living parent are terminated, and a guardian has not been appointed under [Wis. Stat.](#) § 48.977, the court must take one of four actions. Under the first possible option, the court will transfer guardianship and custody pending adoptive placement to one of the following: (1) the county department of social services in Milwaukee; (2) a child welfare agency licensed to accept guardianship; (3) the DCF; (4) a relative with whom the child resides if the relative has filed a petition for adoption or if the relative is a kinship care provider or is receiving foster care payments under [Wis. Stat.](#) § 48.62(4) for providing care and maintenance for the child; or (5) an individual appointed guardian by the court of a foreign jurisdiction. [Wis. Stat.](#) § 48.427(3m)(a), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). Under the second option, the court will transfer guardianship and custody of the child to an authorized county department of social services, in a county other than Milwaukee, for placement of the child for adoption by the child's foster parent, if the county department has agreed to accept guardianship and custody and the foster parent has agreed to the proposed adoption. [Wis. Stat.](#) § 48.427(3m)(am). Under the third alternative, the court may transfer custody to an individual in whose home the child has resided for at least 12 consecutive months immediately before TPR or to a relative. [Wis. Stat.](#) § 48.427(3m)(b). In cases in this third scenario, the court transfers guardianship to the county department of social services in Milwaukee, a child welfare agency licensed to accept guardianship, or the DCF. *Id.* Finally, the court may appoint a guardian under [Wis. Stat.](#) § 48.977 and transfer guardianship and custody to that guardian. [Wis. Stat.](#) § 48.427(3m)(c).

Note. WICWA provides additional requirements for the preadoptive placement of an Indian child. [Wis. Stat.](#) §§ 48.427(5), 48.028(7)(b), (c).

Many dispositional hearings are uncontested. The contention between the positions of the parents and the guardian ad litem with respect to the child's best interests is generally brought forth during the fact-finding hearing and at the time the finding of unfitness is made. In some cases, however, it is important that the guardian ad litem be prepared to present to the court compelling reasons for TPR if the guardian ad litem feels that TPR would be in the child's best interest. Once the proceedings have progressed to this point, it is generally beneficial for the court to reach disposition as soon as possible so that a permanent placement may be made for the child.

Finally, at the dispositional hearing, the court must notify parents of their appellate rights in writing. [Wis. Stat.](#) § 48.43(6m).

2. Order [§ 4.105]

The dispositional order must be entered within 10 days after the hearing. [Wis. Stat.](#) § 48.427(1). The court of appeals has held, in an unpublished decision, that the 10-day period under [Wis. Stat.](#) § 48.427(1) is nonjurisdictional. *Dane Cnty. Dep't of Hum. Servs. v. Antjuan E. (In re Termination of Parental Rts. to Eternity E.)*, Nos. [01-2009](#), [01-2010](#), 2001 WL 1313822 (Wis. Ct. App. Oct. 25, 2001) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (holding that court did not lose competency to proceed after 10 days had expired); *see also* [Wis. Stat.](#) § 48.315(3) ("Failure by the court or a party to act within any time period specified in this chapter does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction.").

The judgment must make findings and order disposition in accordance with the statutory standard and factors. [Wis. Stat.](#) §§ 48.43, 48.426. If both parents' rights are being terminated, the court must include in the order the identity of the agency receiving

guardianship for adoptive placement or the identity of the agencies and persons responsible for the treatment plan if the child will be in need of continued care and treatment, [Wis. Stat.](#) § 48.43(1)(a), (b), as well as a permanency plan for the child and an express finding that the termination of parental rights is in the child's best interests. [Wis. Stat.](#) § 48.43(1)(c), (d). If the DCF or a county department receives guardianship or custody of a child under [Wis. Stat.](#) § 48.43(1)(a), the dispositional order must also include an order ordering the child into the placement and care responsibility of the DCF or the county department, as required under 42 [U.S.C.](#) § 672(a)(2), and assigning primary responsibility for providing services to the child. [Wis. Stat.](#) § 48.43(1)(am). In addition, if a permanency plan has previously been prepared for the child, the dispositional order must contain a finding about whether the agency primarily responsible for providing services to the child has made reasonable efforts to achieve the permanency goal of the child's permanency plan. [Wis. Stat.](#) § 48.43(1)(cm). Under [Wis. Stat.](#) § 48.43(5)(a), the order must require the agency accepting guardianship to report to the court on the child's status at least once each year until the child is adopted or reaches age 18, whichever is sooner. The agency must file this report no fewer than 30 days before the anniversary date of the court order and may file additional reports at any time it determines that more frequent reporting is appropriate. [Wis. Stat.](#) § 48.43(5)(a). If details regarding aspects of the child's care and treatment, development, and special needs are to be covered in the guardian's annual report, they must be specified in the court order. The court must also require the agency to summarize the child's permanency plan and any recommendations of the [Wis. Stat.](#) § 48.38(5) review panel and to describe any progress that has been made in finding a permanent placement for the child. *Id.*

If TPR is ordered, the court should find that all possible, nonpetitioning birth parents have been properly served or given notice; that the child's paternity has not been previously adjudicated in any jurisdiction, or that if it has, the adjudicated father's parental rights have been properly terminated; that no person has filed a declaration of paternal interest or acknowledged paternity or that if such a declaration has been filed, or paternity acknowledged, that person's interests have been ascertained; that during the conception period defined by statute, the birth mother had sexual intercourse with the specific alleged fathers; that one or more persons is determined to be the father of the child; that the allegations in the petition for termination of parental rights have been established; and that the consents given by the parents to termination of their parental rights are informed and voluntary, given freely and without any coercion or promise of reward. Finally, the court must make a finding that TPR is in the best interests of the child. *See* [Wis. Stat.](#) §§ 48.426(2), 48.43(1)(d).

Once the court enters a dispositional order terminating parental rights, the judge must inform the birth parents of statutory provisions regarding access to medical information and identifying information and regarding release of identifying information by an adoption agency. [Wis. Stat.](#) § 48.427(6)(a). The guardian ad litem should remind the judge, if necessary, of these requirements and check the dispositional order to make sure that copies of the relevant statutes, *see* [Wis. Stat.](#) §§ 48.432 (access to medical information), 48.433 (access to identifying information), and 48.434 (release of identifying information by agency), are attached. The guardian ad litem also should ensure that the birth parents comply with [Wis. Stat.](#) § 48.422(9)(a), if applicable. [Wis. Stat.](#) § 48.422(9)(a), requiring the court to order any parent whose parental rights might be terminated to file with the court the medical information required by [Wis. Stat.](#) § 48.425(1)(am), is applicable when the TPR is not filed by an agency or the court report requirement is waived. Under these circumstances, a report containing the information required by [Wis. Stat.](#) § 48.425(1)(am) might not otherwise exist.

Note. [Wis. Stat.](#) § 48.433 provides a procedure for an adopted person to access identifying information about the person's birth parents. *See generally* [Wis. Stat.](#) § 48.433. The statute also allows an "offspring"—an adult who is the child of a person whose birth parents' parental rights were terminated in Wisconsin or whose birth parents consented to adoption before February 1, 1982—to request certain information concerning the person's birth. [Wis. Stat.](#) § 48.433(8g).

Any birth parent whose parental rights have been terminated may file relevant medical or genetic information with the DCF or an agency with which the department has contracted under [Wis. Stat.](#) § 48.432(9). [Wis. Stat.](#) § 48.432(2)(b). The medical or genetic information filed by the birth parent may be released to any of the following persons upon request: (1) the child, if age 18 or older; (2) the child's adoptive parent, guardian, or legal custodian; (3) the child's offspring, if the child is age 18 or older; (4) the parent, guardian, or legal custodian of an offspring of a deceased individual or adoptee, if the offspring is under age 18; and (5) the agency or social worker providing services or placing the child for adoption. [Wis. Stat.](#) § 48.432(3)(a). If any of those persons or the agency providing services seeks medical or genetic information that is not on file, the person or agency may request that the DCF or an agency with whom the department has contracted under [Wis. Stat.](#) § 48.432(9) search for the birth parents to obtain the information. [Wis. Stat.](#) § 48.432(4)(a). The court must forward the following information to the DCF or an agency with which the department has contracted under [Wis. Stat.](#) § 48.432(9): (1) the child's name and date of birth; (2) the names and current addresses of the child's birth parents, guardian, and legal custodian; (3) the medical and genetic information obtained under [Wis. Stat.](#) §§ 48.422(9) or 48.425(1)(am) or (2); and (4) if the court knows or has reason to know that the child is an Indian child, information relating to the child's membership or eligibility for membership in an Indian tribe. [Wis. Stat.](#) § 48.427(6)(b).

The dispositional order for TPR must recite the [Wis. Stat.](#) § 48.426 standard and factors. The order must terminate the parental rights of the birth mother and all possible birth fathers and must order the filing of the medical and genetic information required by [Wis. Stat.](#) § 48.422(9)(a). It must order an appropriate person or entity under [Wis. Stat.](#) § 48.427 to accept guardianship of the child and to file the appropriate [Wis. Stat.](#) § 48.43(5) reports. In addition, the court must furnish a certified copy of the dispositional order to the agency accepting guardianship for adoptive placement. [Wis. Stat.](#) § 48.43(4). Upon request, a certified copy of the child's birth certificate and a transcript of the testimony elicited at the TPR hearing must also be provided. *Id.*

If a child needs to be placed in a QRTP after a parent's rights have been terminated, but before adoption, requirements similar to those for a QRTP placement under a temporary physical custody or dispositional order apply. The standardized assessment must be completed with the notice of change in placement. If the assessment is not ready when the notice is filed, then it should be filed no later than 10 days after the notice is filed. [Wis. Stat.](#) § 48.437(1)(a)3. If good cause is shown, the assessment can be submitted no more than 30 days from the date of placement. [Wis. Stat.](#) § 48.437(1)(a)4.

The order for out-of-home placement must include the same findings for a QRTP placement. See [Wis. Stat.](#) § 48.437(2v)(d)1. The court again must issue an order with the required findings within 60 days after the date of placement if the report is unable to be filed with the request. [Wis. Stat.](#) § 48.437(2v)(d)(2).

The same process is used if the notice of change of placement indicates that the change of placement was done on an emergency basis. [Wis. Stat.](#) § 48.437(2)(b), (c).

M. Rehearing and Appeal [§ 4.106]

For an appeal from a judgment or order terminating parental rights or denying termination of parental rights, all parties, including the state, must file a notice of intent to pursue appellate relief within 30 days after the entry of the judgment or order appealed from. [Wis. Stat.](#) §§ 48.46(2), 808.04(7m); see also [Wis. Stat.](#) § 809.107.

Once the notice of intent to appeal is filed, the following steps occur in the appellate process. First, if not requesting representation by the public defender on appeal, the party seeking the appeal must request transcripts and may request a copy of the circuit court case record within 15 days after filing the notice of intent to appeal. [Wis. Stat.](#) § 809.107(4)(b). If the party seeking the appeal has requested but been denied representation by the state public defender on appeal, the party must request transcripts and may request a copy of the circuit court case record within 30 days after filing a notice of intent to appeal. *Id.* If the appellant is, however, successful in requesting public defender representation, the state public defender must appoint counsel and request a transcript and a copy of the circuit court case record within 15 days after the state public defender's appellate intake office has received preliminary information under [Wis. Stat.](#) § 809.107(3)(a) about the case from the circuit court. [Wis. Stat.](#) § 809.107(4)(a). The court reporter must file the transcript and serve a copy on the person contemplating an appeal within 30 days after the transcripts are requested. [Wis. Stat.](#) § 809.107(4m). A notice of appeal must then be filed within 30 days after the later of the service of the transcripts or the circuit court case record. [Wis. Stat.](#) § 809.107(5)(a). For an appellant other than the state, the appellant on whose behalf the notice of appeal is filed must sign the notice. Appellant's counsel, if any, must also sign the notice of appeal, but cannot sign in lieu of the appellant. *Id.*

The guardian ad litem may choose whether to participate in the TPR appeal. [Wis. Stat.](#) § 48.235(7). If the guardian ad litem appointed under [Wis. Stat.](#) § 48.235(1)(c) for the child who is the subject of the TPR proceeding takes the position of the appellant, then the guardian ad litem's brief must be filed within 15 days after the filing of the record on appeal with the court of appeals. [Wis. Stat.](#) § 809.107(6)(d). If the guardian ad litem takes the position of a respondent, the guardian ad litem's brief must be filed within 10 days after service of the appellant's brief. *Id.* If the guardian ad litem chooses not to participate in an appeal, the guardian ad litem must file with the court a statement of reasons for not participating under [Wis. Stat.](#) § 48.235(7) within 15 days after the filing of the notice of appeal. *Id.*

If new evidence is discovered within one year after the court's original adjudication of the child's status, the parent, guardian, legal custodian, or child may petition for a rehearing. [Wis. Stat.](#) § 48.46(1). If adequate new evidence is shown to exist, the court must order a new hearing. *Id.* Because no specific statute addresses appeals from a grant or denial of such relief, the provisions of [Wis. Stat.](#) §§ 48.46, 808.04(3) and (4), and 809.30(2)(b) may apply, although adherence to the more stringent time periods set forth above may be wise. If appellate counsel fails to appeal before the deadline, a writ of habeas corpus may be used in the court of appeals to seek relief from a TPR order, even though there is no restraint on the petitioner's liberty. *Amy W. v. David G. (In re Termination of*

Parental Rts. to Alexandria G.), [2013 WI App 83](#), [348 Wis. 2d 593](#), [834 N.W.2d 432](#). For additional information about appeals in TPR cases, see [Wisconsin Juvenile Law Handbook](#), *supra* § [4.1](#), ch. 13.

N. Miscellaneous Provisions [§ 4.107]

1. Procedure at Hearings [§ 4.108]

All TPR proceedings must be conducted by a judge, not a circuit court commissioner. [Wis. Stat.](#) § 757.69(1m)(c). The child must be present at hearings unless the court finds that a particular child under the age of seven is too young to comprehend the hearing and that it is in that child's best interest to be excluded from the hearing. [Wis. Stat.](#) § 48.299(3). The court may also exclude any child from the TPR fact-finding hearing. [Wis. Stat.](#) § 48.424(2)(a). As a general practice, children of all ages are routinely excused from TPR proceedings.

As with other hearings under the Children's Code, [Wis. Stat.](#) §§ 48.299(1)(a) and 48.424(2)(b) require that the general public be excluded from TPR hearings. Only the parties, counsel, the guardian ad litem, the child's court-appointed special advocate, the child's foster parent or physical custodian, witnesses, and anyone requested by a party and approved by the court may be present. [Wis. Stat.](#) § 48.299(1)(ag). The court may, however, exclude a foster parent or other physical custodian from a portion of the hearing that deals with sensitive personal information of the child or the child's family or if the court determines that excluding the foster parent or other physical custodian would be in the best interests of the child. *Id.* The court may also permit the presence of a nonparty whom the court finds to have a proper interest in the case or the court's work, including a member of the bar or a person engaged in the bona fide research, monitoring, or evaluation of activities conducted under 42 [U.S.C.](#) § 629h (relating to foster care and adoption), as determined by the director of state courts. *Id.* The representatives of an entity who are engaged in bona fide activities must maintain confidentiality of juvenile court records they inspect or copy and may use and further disclose those records only for the purpose for which the records were requested. [Wis. Stat.](#) § 48.396(2)(b). The contempt of court provisions in [Wis. Stat.](#) ch. 785 apply to anyone who divulges information that would identify the child or family.

2. Indian Child Welfare Act [§ 4.109]

ICWA, 25 [U.S.C.](#) §§ 1901–1963, supersedes the provisions of the Children's Code in Indian child custody proceedings governed by ICWA, “except that in any case in which [[Wis. Stat.](#) ch. 48] provides a higher standard of protection for the rights of an Indian child's parent or Indian custodian than the rights provided under [ICWA], the court shall apply the standard under [[Wis. Stat.](#) ch. 48].” [Wis. Stat.](#) § 48.028(10). An *Indian child custody proceeding* includes a proceeding to terminate parental rights to an Indian child, as well as other proceedings governed by ICWA that might result in an adoptive placement, an out-of-home-care placement, or a preadoptive placement. [Wis. Stat.](#) § 48.028(2)(d).

Practice Tip. A parent's consent in a voluntary TPR case involving an Indian child must be in writing, recorded before a judge, and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained and understood. Form [IW-1637](#) contains the judge's certificate and should be used. See [Wis. Stat.](#) § 48.028(5)(b).

ICWA and [Wis. Stat.](#) § 48.028 impose additional jurisdictional and procedural requirements on the juvenile court. Whenever an Indian child is the subject of the proceedings, these statutes must be reviewed and complied with. For example, there is a dual burden of proof in TPR cases involving Indian children. Generally, in a TPR proceeding, the petitioner bears the burden of proving by clear and convincing evidence the allegations of the petition. [Wis. Stat.](#) §§ 48.31(1), 48.424(2). When the case involves an Indian child, however, the burden of proof on some elements is proof beyond a reasonable doubt—specifically, on the issue that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 [U.S.C.](#) § 1912(f); [Wis. Stat.](#) § 48.028(4)(e)1.; see *Monroe Cnty. Dep't of Hum. Servs. v. Luis R. (In re Termination of Parental Rts. to Vaughn R.)*, [2009 WI App 109](#), ¶¶ 19–29, [320 Wis. 2d 652](#), [770 N.W.2d 795](#) (reversing TPR order when parent had legal and physical custody at some time before TPR filing), distinguished by *Kewaunee Cnty. Dep't of Hum. Servs. v. R.I. (In re Termination of Parental Rts. to M.J.)*, [2018 WI App 7](#), ¶ 16 n.8, [379 Wis. 2d 750](#), [907 N.W.2d 105](#) (affirming TPR order on abandonment grounds when parent never had custody of child); see also *I.P. v. State (In the Int. of D.S.P.)*, [166 Wis. 2d 464](#), [480 N.W.2d 234](#) (1992) (holding that circuit court properly instructed jury on dual burdens).

For further information about ICWA and the Wisconsin version of the federal ICWA as codified into the Wisconsin statutes in [Wis. Stat.](#) § 48.028 (WICWA), the guardian ad litem should review the discussion in section [4.51](#), *supra*.

VII. Independent Adoption [§ 4.110]

A. General Information [§ 4.111]

Independent or private adoption—technically, the placement of children with nonrelatives for purposes of adoption—is a procedure codified in [Wis. Stat.](#) § 48.837. This statute enables birth parents to place their children with adoptive parents whom they select (subject to certain restrictions if the proposed adoptive parent resides outside the state, [Wis. Stat.](#) § 48.837(1m)).

Adoptive parents may be people whom the birth parents have known for years or whom they have learned about after the decision to place the child for adoption. The placement decision may be made by both birth parents or by either the mother or the father alone.

When birth parents decide to place a child for adoption, they learn about prospective adoptive parents in many ways. Sometimes, they read anonymized home studies from a child welfare agency; other times, they are put in touch with families through clergy, social workers, friends, family members, physicians, school counselors, or even newspaper advertisements.

Caution. It is unethical for an attorney to represent or act as an intermediary for both birth parents and prospective adoptive parents in a private adoption proceeding. *See* State Bar of Wis. Comm. on Pro. Ethics, Formal Op. E-88-4 (1988). In addition, arranging the placement of a child for adoption could be a felony under [Wis. Stat.](#) § 948.24.

Birth parents are entitled, although not required, to meet the prospective adoptive parents, and they have the right to learn as much about the adoptive home as they wish, if the information they request is in some way related to the child's welfare. Birth parents are entitled to know the adoptive parents' full names and address; often, however, birth parents do not wish to have this information, and, therefore, the confidentiality of the adoptive home is maintained. In many cases, birth parents meet the adoptive parents to discuss their child's upbringing. In some instances, birth parents prefer not to know what the adoptive parents look like, but they communicate with the adoptive parents by telephone or in writing. Each case is handled on an individual basis.

Independent adoption still requires the involvement of an agency or the DCF. An appropriate guardian under [Wis. Stat.](#) § 48.427(3m) must accept guardianship of the child. A county department authorized to accept guardianship under [Wis. Stat.](#) § 48.57(1)(e), the DCF, or a child welfare agency licensed under [Wis. Stat.](#) § 48.61(5) to accept guardianship will have conducted the investigation required by [Wis. Stat.](#) § 48.837(4)(c) and will conduct the post-placement study, resulting in the filing of the recommendation required by [Wis. Stat.](#) §§ 48.841 and 48.85.

B. Financial Arrangements [§ 4.112]

The financial arrangements involved in independent adoptions are strictly controlled by the Wisconsin Criminal Code. It is a violation of [Wis. Stat.](#) § 948.24 for birth parents or adoptive parents to place or to receive a child for adoption based on the payment of anything exceeding the actual costs of the hospital and medical expenses that the mother and child incurred in connection with the child's birth and of the legal and other services rendered in connection with the adoption. *See* [Wis. Stat.](#) § 48.913(1), (2). This restriction does not apply to the adoption of children who are not U.S. citizens. [Wis. Stat.](#) § 948.24(2). Adoptive parents generally pay the unreimbursed medical and hospital expenses of the birth mother and child; counseling fees; foster care costs; agency expenses; and legal fees, including the fees incurred for the birth parents' attorneys, the guardian ad litem for minor birth parents, and the guardian ad litem for the child. These fees must be fully disclosed at the hearing on the petition for adoptive placement. *See* [Wis. Stat.](#) § 48.913(6), (7).

C. Jurisdiction and Venue [§ 4.113]

Caution. *See* [Wis. Stat.](#) § 48.028(3)(b) for provisions relating to tribal jurisdiction over an Indian child custody proceeding. *Cf.* [Wis. Stat.](#) § 48.83(1).

When the birth parents have selected an adoptive home for their child, they and the proposed adoptive parents must file in the circuit court petitions for the termination of the birth parents' parental rights and for approval of adoptive placement. *See* [Wis. Stat.](#) § 48.837(2), (3). The court must determine that the proposed adoptive parents met the criteria in their state of residence, if other than

Wisconsin. [Wis. Stat. § 48.837\(1m\)](#). Any minor who is present in the state when the petition is filed, and whose parents' parental rights have been terminated, may be adopted. [Wis. Stat. § 48.81](#). [Wis. Stat. § 48.82\(1\)](#) requires that the adoptive parents be residents of Wisconsin, although children may be placed outside the state consistent with the provisions of the interstate compact on the placement of children. See [Wis. Stat. § 48.988](#); see also [Wis. Stat. § 48.99](#) (interstate compact for the placement of children), as created by 2009 Wis. Act 339 (becoming effective when 35 states adopt the compact). Under [Wis. Stat. § 48.14\(1\)](#) and (3), exclusive jurisdiction is with the juvenile court. Under [Wis. Stat. § 48.83\(1\)](#), venue in a proceeding for adoption or adoptive placement of a child is in (1) the county where the proposed adoptive parent or child resides when the petition for approval of adoptive placement is filed (if the birth mother is pregnant at the time the petition is filed, the child is deemed to reside wherever the birth mother resides) or (2) the county where a petition for termination of parental rights for the child was filed or granted under [Wis. Stat. §§ 48.40–.837](#). The court may transfer the case to a court in the county in which the proposed adoptive parents reside. [Wis. Stat. § 48.83\(1\)](#). Venue may also be in the county where the birth mother resides. [Wis. Stat. § 48.185](#); *David S. v. Laura S. (In the Int. of Brandon S.S.)*, [179 Wis.2d 114](#), [507 N.W.2d 94](#) (1993).

D. Required Documents [§ 4.114]

The requirements for the petition for approval of adoptive placement are set forth in [Wis. Stat. § 48.837\(2\)](#). The petition for approval of adoptive placement must be verified and must include the child's name and age or the child's expected birth date; the birth parents' names, ages, and addresses; the proposed adoptive parents' names, ages, and addresses; the identity of any persons or agencies that solicited, negotiated, or arranged the placement with the proposed adoptive parents; a statement that the proposed adoptive parents have completed the preadoption preparation required under [Wis. Stat. § 48.84\(1\)](#) or need not complete that preparation; and, if the child is an Indian child, the names and addresses of the child's Indian custodian, if any, and tribe, if known. [Wis. Stat. § 48.837\(2\)\(a\)–\(e\)](#).

The petition must report all transfers of anything of value made or agreed to be made by the proposed adoptive parents or on their behalf. [Wis. Stat. § 48.913\(7\)](#). The financial report must be itemized and must show services related to the placement of the child for adoption. *Id.* The financial report must also contain the date of each payment and the names and addresses of each attorney, doctor, hospital, agency, or other person or organization receiving any funds from the proposed adoptive parents in connection with the pregnancy, the birth of the child, or the child's adoption or placement. *Id.* The report must be filed with the court at or before the hearing on the adoption. [Wis. Stat. § 48.913\(6\)](#).

[Wis. Stat. § 48.837\(3\)](#) requires that the petition for voluntary TPR be filed contemporaneously with the petition for approval of adoptive placement. [Wis. Stat. § 48.42](#) sets forth the procedures for filing and serving the petition, while [Wis. Stat. § 48.837\(3\)](#) ties the filing of this petition to the procedure for independent adoption. If the nonpetitioning birth parent's parental rights are to be terminated involuntarily, a petition for the involuntary TPR must be filed as well. All the grounds for involuntary TPR are set forth in [Wis. Stat. § 48.415](#), although failure to assume parental responsibility is the ground most commonly used in independent adoption proceedings. See [Wis. Stat. § 48.415\(6\)](#).

E. Responsibilities of the Court [§ 4.115]

1. Scheduling of Hearings [§ 4.116]

The court must schedule a hearing on the petitions for voluntary TPR and approval of adoptive placement within 30 days after the date of filing, except that a hearing cannot be held before the child's birth. [Wis. Stat. § 48.837\(4\)\(a\)](#). Typically, the court will schedule a hearing within a week to a month after the child's birth. This means that, in most cases, the child must be placed in a foster home pending the hearings on the petitions. In certain cases, the DCF, the county department of human or social services, or a licensed child welfare agency may place the child with the proposed adoptive parents before parental rights are terminated and before a petition for adoptive placement is filed, if a parent having custody of the child and the proposed adoptive parents request such a placement. See [Wis. Stat. §§ 48.63\(3\)\(b\)](#), [48.837\(1r\)](#). The specific requirements for placement vary depending on whether the proposed adoptive parents live in Wisconsin or out of state.

2. Appointment of Guardian ad Litem [§ 4.117]

The court must appoint a guardian ad litem to represent the best interests of a petitioning minor birth parent, and the court must appoint a guardian ad litem to represent the child, whether the TPR is voluntary or involuntary. [Wis. Stat. § 48.837\(4\)\(b\)](#); see [Wis.](#)

[Stat.](#) § 48.235(1)(c). The court must appoint a guardian ad litem for a child who is the subject of a contested adoption proceeding. [Wis. Stat.](#) § 48.837(4)(b); see [Wis. Stat.](#) § 48.235(1)(c).

3. Investigation by Child Welfare Agency [§ 4.118]

For in-state adoptions, under [Wis. Stat.](#) § 48.837(4)(c), the court must order an investigation by the DCF, Milwaukee County's department of social services, or any other county agency licensed to accept guardianship and to place children for adoption. If a licensed child welfare agency (or, in the case of an Indian child, the tribal child welfare department of the child's tribe) has investigated a proposed adoptive placement and interviewed the petitioners, the court may accept a report and recommendation from the agency in place of one from one of the above agencies. [Wis. Stat.](#) § 48.837(4)(c).

In many jurisdictions, the juvenile court routinely orders licensed child welfare agencies to investigate and report to the court. The ordered investigation must consist of a study of the proposed adoptive placement, an interview with each petitioner, and a recommendation to the court. The recommendation must be made available to the court at least five days before the hearing on the petitions. *Id.* The agency must also provide counseling if requested. *Id.* If the adoption is an out-of-state adoption, [Wis. Stat.](#) § 48.837(4)(cm) requires that the court use an agency in the state where the adoption is to occur so as to determine whether the proposed adoptive placement meets that state's criteria.

F. Prehearing Responsibilities of the Guardian ad Litem [§ 4.119]

The child's guardian ad litem meets with the child, if the child is old enough, to determine the child's understanding of the TPR and whether the child has any family relationships that it would be harmful to sever. See [Wis. Stat.](#) § 48.235(3)(b)1. In addition, the child's or minor birth parent's guardian ad litem interviews the birth parents, making certain that they understand the role of the child's guardian ad litem and, if applicable, the role of the guardian ad litem for the minor birth parent(s); the nature of the proceedings and the consequences of termination; the right to retain counsel; the advisability of counseling with private or public mental-health-service agencies; and the alternatives to termination. See [Wis. Stat.](#) § 48.235(5). The guardian ad litem ascertains whether the parent understands the proceedings and the kinds of services that would be available to the parent should the parent decide not to consent to TPR. The guardian ad litem evaluates whether the birth parents' decision to terminate has been well thought out and is likely to remain intact through the hearing and after.

The child's guardian ad litem meets with the prospective adoptive parents and assesses their understanding of the appeal period and their attitude about abiding by any court orders should an appeal be filed. The guardian ad litem also ascertains under what circumstances, if any, the adoptive parents might choose not to follow through with the adoption after the post-placement period. At times, the guardian ad litem may wish to consider whether special placement procedures may be beneficial—such as graduated placement with frequent returns to the foster home in cases involving children who are more than six months old and have caregiver attachments—and whether to address them with the birth parents, the adoptive parents, the agency worker, and the foster family. See *supra* [ch. 2](#) (stages of child development, including attachment and the effects of separation on development).

In most cases, the child's guardian ad litem contacts the foster family to determine whether the child has special needs that should be brought to the attention of the agency, the birth parents, the adoptive parents, and the court. After having spoken with the foster parents and the social worker, the guardian ad litem is better prepared to be direct with the adoptive parents with respect to any concerns about the child or special needs that should be addressed. Sometimes the guardian ad litem may also wish to contact the child's pediatrician.

Note. When appointed for an incompetent parent under [Wis. Stat.](#) § 48.235(5m), the guardian ad litem should meet with the parent, the parent's advocacy counsel, and anyone else who may have relevant information that would assist the guardian ad litem in helping the incompetent parent understand the proceedings.

Comment. The recommended procedures may be followed efficiently without being overly time-consuming. Although the agency home study should be reviewed, it is not the guardian ad litem's role to reinvestigate the home, for that is what the licensed child welfare agency has done. It is also not the guardian ad litem's role to be a therapist to any of the parties involved. The bottom line is to provide legal representation in the child's best interests with respect to termination of parental rights and subsequent adoption by the prospective family. The guardian ad litem's goal is to ensure a permanent placement for the child.

G. Hearings on the Petitions [§ 4.120]

The petitioning birth parent (usually the mother, although sometimes both birth parents petition) must appear at all hearings; the nonpetitioning birth parent, usually the father, might not need to appear at all. [Wis. Stat.](#) § 48.41(2)(a), (c). Under [Wis. Stat.](#) § 48.41(2)(b)–(d), a nonpetitioning birth parent who does not appear at the hearings must sign a voluntary consent to TPR in front of witnesses, a notary, or a judge; otherwise parental rights must be terminated involuntarily, using the grounds in [Wis. Stat.](#) § 48.415. These procedures are discussed in detail in sections [4.97–.101](#), *supra*. A representative of the licensed child welfare agency that has conducted the study of the adoptive home should appear at the hearings as well. A child who is 12 years old or older must attend the hearing unless the court, for good cause, waives the attendance requirement. [Wis. Stat.](#) § 48.837(5). Each parent having custody of the child must appear at the hearing on the petition for approval of adoptive placement. *Id.* But see [Wis. Stat.](#) § 48.41(2)(b)2. (permitting telephonic or live audiovisual testimony under certain circumstances)). If the parent who has custody of the child consents and the court approves, the prospective adoptive parents may be present at the TPR hearing. [Wis. Stat.](#) § 48.837(5).

Note. Enforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation. In one case in which the biological mother would not consent to the TPR and there was no legal basis for involuntary termination, the provisions of the surrogacy agreement requiring a voluntary TPR did not comply with the procedural safeguards set forth in [Wis. Stat.](#) § 48.41 for a voluntary TPR. The supreme court nevertheless held that the TPR provisions were severable and provisions relating to custody and physical placement were enforceable. *Rosecky v. Schissel (In re Paternity of F.T.R.)*, [2013 WI 66](#), [349 Wis. 2d 84](#), [833 N.W.2d 634](#); see also Thomas J. Walsh, *Surrogacy Law Still Uncertain*, Wis. Law., Mar. 2014, at 28; Thomas J. Walsh, *Wisconsin's Undeveloped Surrogacy Law*, Wis. Law., Mar. 2012, at 16.

[Wis. Stat.](#) § 48.41(2)(b)1. facilitates giving written consent by parents not residing in the United States, for example, military personnel stationed overseas. The statute provides that consent may be notarized by an embassy or consul official or a military judge in another state, country, or foreign jurisdiction.

When all necessary parties appear in court, the order of proceedings is as follows:

1. Hearing on ascertainment of paternity;
2. Hearing on petition for TPR of nonpetitioning birth parent(s), if any (usually father);
3. Hearing on petition for approval of adoptive placement (which can only occur after termination of all parental rights, [Wis. Stat.](#) § 48.91(2)); and
4. Hearing on petition for TPR of petitioning birth parent(s) (usually mother).

The hearings are scheduled in this order so that before they consent to the termination of their parental rights, the petitioning birth parents receive all the information they want and need about the adoptive placement that they have selected.

At the beginning of the hearing on the petition for approval of adoptive placement, the court must review the report of expenses submitted under [Wis. Stat.](#) § 48.913(6). See *supra* § [4.111](#). The court must determine whether any conditions specified are coercive to the birth parents. [Wis. Stat.](#) § 48.837(6)(b). If any payment is conditional on the transfer of the child, TPR, or the finalization of the adoption, a rebuttable presumption of coercion is created. *Id.* This very difficult situation must be addressed. In most cases, the adoptive parents do not pay medical expenses or medically necessitated lost wages until after the child is placed with them. To agree to make such payments before placement could financially wipe out a prospective adoptive family so that if the placement does not go through, the family may no longer have the resources for a future adoptive placement of a different child. Obviously, evidence must be presented at the hearing to rebut the presumption of coercion in such cases. If the court finds coercion, the court must either dismiss the petition or amend the provisions of the financial agreement to delete any coercive conditions, if the parties agree to the amendment. *Id.*

[Wis. Stat.](#) § 48.837(1r)(e) provides another basis for the court to find coercion in an independent adoption proceeding. That statute states as follows:

Prior to termination of parental rights to the child, no person may coerce a birth parent of the child or any alleged or presumed father of the child into refraining from exercising his or her right to withdraw consent to the transfer or surrender of the child or to termination of his or her parental rights to the child, to have reasonable visitation or contact with the child, or to otherwise exercise his or her parental rights to the child.

[Wis. Stat.](#) § 48.837(1r)(e); *see also* [Wis. Stat.](#) § 48.63(3)(b)5. At the hearing on a petition for adoptive placement under [Wis. Stat.](#) § 48.837(2), the court must determine whether any person has coerced a birth parent or any alleged or presumed father of the child in violation of [Wis. Stat.](#) § 48.837(1r)(e). [Wis. Stat.](#) § 48.837(6)(br). If the court determines that such coercion has occurred, the court must dismiss the petition. [Wis. Stat.](#) § 48.837(6)(br); *see also* [Wis. Stat.](#) § 48.422(7)(br).

TPR hearings are conducted consistent with the provisions of [Wis. Stat.](#) § 48.422. The hearing on the petition for approval of adoptive placement is unique and is designed specifically to provide the court with information on whether this placement is an appropriate one for the child and whether the decision to place the child with these prospective adoptive parents is informed and voluntary on the part of the petitioning birth parents. After the hearing on the petition for approval of adoptive placement, the court must make findings on the allegations in the petition and the agency report and must make a conclusion as to whether placement in this home serves the best interests of the child. [Wis. Stat.](#) § 48.837(6)(c).

The guardian ad litem's role at all hearings for independent adoption is to ensure that the record is complete and to provide the court with information about the child's best interests. The guardian ad litem should draft or review the court orders to be certain that the required findings are made and that the content meets the statutory requirements. The guardian ad litem should also keep in mind that the statutes prohibit the same attorney from representing the adoptive parents and the birth mother or the birth father. [Wis. Stat.](#) § 48.837(8).

Practice Tip. Because these proceedings involve the relinquishment of important constitutional rights, and because the child's future welfare is at stake, it is strongly recommended that the prospective adoptive parents and the petitioning birth parents be represented by independent counsel. Creation of an accurate record, showing that the consent of each parent was informed and voluntary, may well require the appointment of advocacy counsel for the birth parents. The guardian ad litem should encourage the prospective adoptive parents to agree to pay for legal representation for the birth parents. There must be no compromise in ensuring a consistent and permanent placement for the child, whether this placement is with one or both birth parents or with adoptive parents.

H. Court Orders [§ 4.121]

After the hearings on the petition for termination of parental rights and the petition for approval of adoptive placement, the court must enter an order containing an ascertainment of paternity, a disposition terminating the birth parents' parental rights, and an order approving the adoptive placement. As with the dispositional orders discussed in section [4.105](#), *supra*, the court must make findings and order disposition in accordance with the statutory standard and factors in [Wis. Stat.](#) § 48.426 and must order the transfer of guardianship. Additionally, the court must order that the child be placed with the prospective adoptive parents. In most cases, upon the conclusion of the hearings and signing of the orders, the adoptive parents are free to take the child to their home. *See* [Wis. Stat.](#) §§ 48.43, 48.91.

VIII.

Payment of the Guardian ad Litem [§ 4.122]

The compensation paid by the county to guardians ad litem is at a rate determined by the court to be reasonable. [Wis. Stat.](#) § 48.235(8). In certain circumstances, however, this amount cannot exceed the compensation paid to private attorneys under [Wis. Stat.](#) § 977.08(4m)(b). [Wis. Stat.](#) § 48.235(8). The current rate under [Wis. Stat.](#) § 977.08(4m)(e) is \$100 per hour for time spent related to the case (excluding travel) and \$50 per hour for time spent in travel outside the county (or for a trip that requires traveling a distance of more than 30 miles, one way, from the attorney's principal office); *see also* [SCR](#) 81.02.

In uncontested TPR proceedings and uncontested adoption cases under [Wis. Stat.](#) §§ 48.835 and 48.837, guardian ad litem fees must be paid by the prospective adoptive parents. [Wis. Stat.](#) § 48.235(8)(c)2. In uncontested TPR proceedings and uncontested adoptions under [Wis. Stat.](#) § 48.833, guardian ad litem fees must be paid by the agency. [Wis. Stat.](#) § 48.235(8)(c)1. If the prospective adoptive parents are unable to pay, the court may direct that the county of venue pay the fees, in whole or in part, and may direct that the prospective adoptive parents reimburse the county, in whole or in part, for the payment. [Wis. Stat.](#) § 48.235(8)(b). At any time

before the final order for adoption, the court may order that funds be placed into an escrow account in an amount estimated to be sufficient to compensate the guardian ad litem for the guardian ad litem's services. [Wis. Stat. § 48.235\(8\)\(d\)](#). If the proceedings are contested, the county must compensate the guardian ad litem for services rendered, unless the court orders one or both parents to compensate the guardian ad litem. [Wis. Stat. § 48.235\(8\)](#).

The guardian ad litem should check the local rules about payment. Generally, the guardian ad litem submits an itemized bill to the court, either periodically or at the end of the case. The practice in this regard varies from jurisdiction to jurisdiction. For a general discussion of payment of the guardian ad litem, see [chapter 1](#), *supra*.

Chapter 5

Adults with Mental Disabilities: The Human Side

[Jeffrey Spitzer-Resnick](#)

I. Scope [§ 5.1]

This chapter attempts to assist guardians ad litem in their work with people with mental disabilities, including those who experience an intellectual disability, an autism spectrum disorder, brain injuries, serious and persistent mental illness, and degenerative brain disorders, including those associated with aging. The chapter provides background on the nature of mental disabilities and associated conditions; criteria for defining best interests in the contexts of guardianship, protective services, and protective placement actions; information on evaluating needs and reviewing and requesting professional evaluations; background on how needed support services are funded and delivered under Wisconsin law; and information on a court's authority to order a county to provide needed placements or services. The chapter also discusses the role of the guardian ad litem in actions involving mentally disabled adults. For specific information on guardianships, protective services and protective placement, and admissions and commitments to psychiatric facilities, see [chapters 6–8](#), *infra*.¹

Since the statutes spell out the procedures for visiting the client, informing the client and guardian of procedural and substantive rights, and reporting to the court, guardians ad litem in guardianship and protective placement cases sometimes see these procedures as the required minimum for fulfilling their role. Although these procedures are important, a guardian ad litem (commonly referred to as a GAL) should remember that the guardian ad litem is appointed for the entire proceeding, and, as in any other proceeding involving a guardian ad litem, the guardian ad litem's duties will generally extend beyond the statutory minimum. Ultimately, *the guardian ad litem's central role is to represent and advocate for the best interests of the client*.

Note. Unless otherwise indicated, this chapter uses the term “client” to refer to the person who is the subject of a court proceeding in which a guardian ad litem is appointed. As explained elsewhere in this *Handbook*, however, see, e.g., *supra* [ch. 1](#), the guardian ad litem formally represents that person's “best interests” as the client. Of course, just like the legal fiction in which a corporation is considered to be a “person,” a guardian ad litem must work with the ward or proposed ward as a person to determine that person's best interests.

The role of advocating for the client's best interests is a challenging one. The guardian ad litem is a lawyer and, in most cases, is not an expert on the needs of people with mental disabilities or the services available to meet those needs. Nevertheless, the guardian ad litem must try to determine the viewpoints of the client, family, guardian, friends, and professionals involved, and must come to an independent determination of what result will be in the client's best interests.

II. Understanding People with Mental Disabilities [§ 5.2]

A. Overview [§ 5.3]

The history of people with mental disabilities is a history of society's stereotypes and misconceptions about their characteristics and needs. For example, Wisconsin's public policy about people with an intellectual disability was, for more than 50 years, built on

the notion that they were by nature criminal, which in turn led to their removal from society, segregation in large institutions, and mandatory sterilization. Anne V. Rugg, *Children of Misfortune: One Hundred Years of Public Care for People with Mental Retardation in Wisconsin, 1871–1971* 18 (1984), <https://mn.gov/mnddc/parallels2/pdf/80s/83/83-COM-WCD.pdf>.

Similarly, the belief that people with an intellectual disability were incapable of learning led to depriving people with an intellectual disability of all educational opportunities, ordinary human experiences, and social interactions. The common misconception that people with an intellectual disability were “eternal children” led to the idea that disabled adults should be treated as children.

An understanding of the characteristics of people with mental disabilities, and of the supports people need to be part of their communities and develop greater independence, is essential to changing past patterns of unnecessary exclusion from society and denial of opportunities for normal experiences. A clear understanding of the distinctions that lead to the various labels, such as intellectually disabled or mentally ill, is also important: people who are labeled seriously and persistently mentally ill have enough challenges without the added burden of having others assume that they are also intellectually disabled, and vice versa.

Readers should be aware that the categories set out in this chapter are simply labels given to people who have a set of characteristics in common. These characteristics could have many different causes, and often the causes are not known. People with the labels are individuals who will vary in many ways not related to the label. They might have different combinations of characteristics, different levels of ability, and different life experiences. People with the same label are therefore likely to be as different from each other as any other two people. Above all, it is essential to remember that people with these labels are still people and are like everyone else in far more ways than they are different.

B. Intellectual Disability [§ 5.4]

This chapter uses the term “intellectual disability” in place of “mental retardation.” The terms “intellectual disability” and “cognitive disability” have replaced the term “mental retardation” in common and legal usage. For example, “intellectual disability” is the term now used in Wisconsin statutes related to guardianship, protective placement, and services for adults with developmental disabilities. *See, e.g., Wis. Stat.* §§ 51.01(5)(a), 54.01(8), 55.01(2) (defining “developmental disability” to include disability attributable to “intellectual disability”); *cf. Wis. Stat.* § 115.76(5)(a) (defining “child with a disability” in context of education).

While federal regulations use the term intermediate care facilities for individuals with intellectual disabilities (ICF/IID or ICF/ID) in place of former references to intermediate care facilities for the mentally retarded (ICF-MR), *see, e.g., 42 C.F.R.* § 440.150(a), Wisconsin now refers to these facilities as “facilities serving people with developmental disabilities” (FDD). *See, e.g., Wis. Admin. Code* § DHS 134.13 (defining “FDD” as “a residential facility with a capacity of 4 or more individuals who need and receive active treatment and health services as needed”).

Note. Some state and federal statutes and regulations continue to use the term “intermediate care facility for the mentally retarded” and the abbreviation “ICF-MR” for Medicaid-funded institutions for persons with an intellectual disability. *See, e.g., 42 U.S.C.* § 1396d(d); *Wis. Stat.* §§ 46.278(1m)(am) (“‘Intermediate care facility for persons with an intellectual disability’ has the meaning given for ‘intermediate care facility for the mentally retarded’ under 42 USC [§] 1396d(d).”), 46.279(1)(b) (simply using the term “intermediate facility”). This chapter retains the ICF-MR terminology only when necessary if referring to federal law in the limited context of Medicaid-funded facilities.

The following definition of intellectual disability has been adopted by the American Association on Intellectual and Developmental Disabilities (AAIDD):

Intellectual disability is a condition characterized by significant limitations in both intellectual functioning and adaptive behavior that originates before the age of 22.

AAIDD, *Defining Criteria for Intellectual Disability*, <https://aaidd.org/intellectual-disability/definition> (last visited Sept. 30, 2024).

The AAIDD recommends doing the following in applying this definition:

1. Evaluate limitations in present intellectual and adaptive behavior functioning within the context of the individual’s age, peers, and culture.

2. Take into account the individual's cultural and linguistic differences as well as communication, sensory, motor, and behavioral factors.
3. Recognize that limitations often coexist with strengths within an individual.
4. Describe limitations so that an individualized plan of needed supports can be developed.
5. Provide appropriate, personalized supports to improve the functioning of a person with intellectual disability.

See AAIDD, *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition* (2008), https://aidd.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=2; see AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (12th ed. 2021).

The AAIDD's definition is intended to emphasize that the term intellectual disability applies to the way the person functions and not to any specific biological characteristic or disorder. The definition and its underlying assumptions emphasize the importance of environment and social supports in determining a person's current and future functional abilities. In less technical terms, intellectual disability is a label applied to any person who learns significantly more slowly or with greater difficulty than most other people, who as a result has a harder time coping in typical social and community situations, and who has shown these characteristics since childhood. This definition is a social construct; it labels people based on a comparison of how they function to how people function generally.

Intellectual disability has a variety of causes, including inadequate prenatal and postnatal nutrition or care, lack of adequate stimulation toward growth and development, birth accidents, disease in the mother before or at birth, lead poisoning, childhood diseases, inherited genetic syndromes, chromosomal abnormalities (such as Down syndrome), or physical malformations (such as hydrocephalus) producing damage to the brain. Even today, no clear assignment of cause is possible in many cases.

People who are labeled intellectually disabled come from every community, race, religion, and economic background. They have a broad range of characteristics and abilities. Some learn to function normally in society without special supports, while others require a great deal of teaching and support to engage in any purposeful activity.

Individuals with an intellectual disability have traditionally been classified along a continuum of mild, moderate, severe, and profound disability. While some useful generalizations can be made about milder and more severe degrees of impairment, these categories mask the fact that individuals may experience impairment in different adaptive skill areas, and that there may be a broad range of skills even within a category. A label of severe or profound disability, for example, does not necessarily indicate an inability to communicate or understand, to learn, or to engage in productive work.

People with an intellectual disability are likely to learn more slowly than people without an intellectual disability. Even simple tasks, such as putting on a shirt, may need to be broken down into steps and taught one step at a time. People with an intellectual disability may also have greater difficulty retaining and recalling information; they may need special cues or reminders about when to do a particular activity. Often, their learning will be concrete rather than abstract, and they will have difficulty applying concepts and skills learned in one situation to new settings or circumstances. They may lack judgment and insight and may require advice and guidance (or a substitute decision maker) when making complex choices. Because of poor communication and social skills, isolation, and negative stereotypes, people with an intellectual disability are likely to need special support to develop and maintain relationships with other people. In some cases, they will need long-term supervision and support to carry out daily living activities and to engage in productive work.

The fact that a person might learn very slowly does not mean that the person is incapable of learning. No line divides people who are capable of change and growth from those who are not, nor is there any point beyond which an individual with an intellectual disability is incapable of learning anything more. A key assumption of the AAIDD definition of intellectual disability is that for all people with an intellectual disability, some improvement in life functioning is a likely result of having appropriate supports.

The paradigm for supports and services for adults with an intellectual disability has shifted over the years. Whereas traditional plans tended to be based on the assumption that a person who needed more intensive supports also needed a more restrictive setting, it is now more common to focus on providing individualized functional supports to help people be full members of the community at their current level of functioning and on teaching needed skills in the community context where they would be used. See Wis. Bd. for People with Developmental Disabilities, *Blueprint: Community Supported Living within Wisconsin's Long-Term Care System*, (Sept. 2016) <https://wi-bpdd.org/wp-content/uploads/2016/09/Blueprint.pdf>.

Services and settings for people with an intellectual disability should be designed on a developmental model; such a model assumes that they, like all people, undergo behavioral change, the direction and rate of which is influenced by learning and living environments. A well-planned habilitation program and positive setting can help a person with intellectual disability learn new skills and develop positive behaviors. Conversely, a custodial environment depriving the person of participation in the community, stimulation, normal relationships, and learning opportunities is likely to lead to loss of skills, withdrawal, and self-stimulatory or attention-getting behaviors.

Part of the problem with providing appropriate services for people with an intellectual disability is that they are often seen as childlike. This is reinforced by functional ability scores expressed in terms of mental age. However, the assumption that people with an intellectual disability are childlike is erroneous: a person who has lived 30 years is not a child, and thinking of adults as children is likely to lead others to overprotect them and ignore their real needs. *See generally* Mary Beirne-Smith et al., *Mental Retardation: An Introduction to Intellectual Disabilities* (7th ed. 2006).

The amount of time and resources needed to help a person with an intellectual disability learn needed skills, make choices, and develop satisfying relationships has important implications for design of placement and services. Skills that are taught should be relevant to the person's needs and taught as much as possible in the environment where they will be used. Like any other skill, the skill of making choices must be taught, and the person should be given natural opportunities to practice this skill. People with an intellectual disability should live, learn, work, and have recreational opportunities in ordinary situations where they are likely to meet a variety of people. They will learn effective communication and social skills best from people who themselves have those skills. They will become integrated into the community most effectively as a result of relationships with people who themselves are accepted members of the community. A conscious effort should be made to promote and preserve stability in the relationships the person does develop.

C. Autism Spectrum Disorder [§ 5.5]

According to the American Psychiatric Association,

Autism spectrum disorder (ASD) is a complex developmental condition involving persistent challenges with social communication, restricted interests and repetitive behavior. While autism is considered a lifelong disorder, the degree of impairment in functioning because of these challenges varies between individuals with autism.

According to the Centers for Disease Control and Prevention, an estimated one in 36 children has been identified with autism spectrum disorder.

...

Early signs of this disorder can be noticed by parents [and] caregivers or pediatricians before a child reaches one year of age. However, symptoms typically become more consistently visible by the time a child is 2 or 3 years old. In some cases, the problems related to autism may be mild and not apparent until the child starts school, after which their deficits may be pronounced when amongst their peers.

Social communication deficits may include:

- Decreased sharing of interests with others.
- Difficulty appreciating their own & others' emotions.
- Aversion to maintaining eye contact.
- Lack of proficiency with use of non-verbal gestures.
- Stilted or scripted speech.
- Interpreting abstract ideas literally.
- Difficulty making friends or keeping them.

Restricted interests and repetitive behaviors may include:

- Inflexibility of behavior, extreme difficulty coping with change.
- Being overly focused on niche subjects to the exclusion of others.

- Expecting others to be equally interested in those subjects.
- Difficulty tolerating changes in routine and new experiences.
- Sensory hypersensitivity, e.g., aversion to loud noises.
- Stereotypical movements such as hand flapping, rocking, spinning.
- Arranging things, often toys, in a very particular manner.

Am. Psychiatric Ass'n, *What Is Autism Spectrum Disorder?*, <https://www.psychiatry.org/patients-families/autism/what-is-autism-spectrum-disorder> (reviewed Jan. 2024) (footnotes omitted).

Note. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*, as revised in 2013, eliminated the separate diagnostic labels of “autistic disorder,” “Asperger’s disorder,” and “pervasive developmental disorder not otherwise specified” (PDD-NOS). Instead, it adopted a single category of “autism spectrum disorder” and created distinctions within that category by severity level.

On March 18, 2022, the APA updated the diagnostic criteria for autism spectrum disorder in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR)*. Under diagnostic criterion A, which describes deficits in social communication and social interaction, the phrase “as manifested by the following” has been revised to read “as manifested by all of the following.” *DSM-5-TR* at 56.

The APA’s *DSM-5-TR* work group said its intent was to improve clarity and “maintain a high diagnostic threshold.” It could have been inferred, based on the previous wording, that the presence of any of the criteria would have met the diagnostic threshold. The new wording aims to prevent that misreading. See APA, *DSM-5-TR and Diagnoses for Children* (2022), <https://www.psychiatry.org/getmedia/178f173b-f4a1-433b-aef3-7b2fb513436b/APA-DSM5TR-DiagnosesforChildren.pdf>.

The new phrasing means that to meet the diagnostic threshold, someone would have to experience persistent deficits in all of these areas:

- Social-emotional reciprocity;
- Nonverbal communicative behaviors used in social interactions; and
- Developing, maintaining, and understanding relationships.

Id.

In addition to these social communication and interaction differences, at least two of four types of restricted or repetitive behaviors must also be present to meet the *DSM-5-TR* diagnostic criteria. Restricted or repetitive behaviors involve:

- “Stereotyped or repetitive motor movements, use of objects, or speech”;
- “Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior”;
- “Highly restricted, fixated interests that are abnormal in intensity or focus”;
- “Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment.”

Id. at 56–57.

When evaluators look at pragmatic skills, they are generally assessing two primary domains: (1) social communication and social interaction; and (2) restricted repetitive behaviors, interests, and activities), plus a bridge that connects the two domains:

- Patterns of movement or speech;
- Sameness of routines or rituals;
- Special, highly focused interests; and
- Strong responses to sensations in the environment.

Id.

The actual causes of autism spectrum disorder are not known and the symptoms vary from individual to individual. The symptoms are presumed to be a result of disorders of the central nervous system that interfere with the ability to absorb and respond to language and sensory input. The symptoms may, in part, reflect issues of timing, both in the sense of delayed response and of inability to take

in and interpret concurrent stimuli, such as words connected with body language. The severity of characteristics also varies. In its mildest form, autism spectrum disorder resembles a learning disability, while severe autism could result in complete withdrawal, highly repetitive behavior, and, in some cases, self-injurious or aggressive behavior.

Although autism spectrum disorder is often associated with an intellectual disability, many people with autism spectrum disorder are not intellectually disabled. Some people with autism spectrum disorder have unusual talents, often in musical or mathematical areas or in activities, such as puzzles and assembly work that involve spatial relationships. *See generally* SSM Health Treffert Ctr., *Savant Syndrome*, <https://www.ssmhealth.com/treffert-center/conditions-treatments/savant-syndrome> (last visited Sept. 30, 2024). Many people with autism are neither intellectually disabled nor savants.

People with autism spectrum disorder cannot be cured in the sense that their neurological impairment will disappear. In fact, many self-advocates with autism spectrum disorder advocate for inclusion and describe themselves as having different sensory experiences. *See, e.g.*, Autism Self Advocacy Network (ASAN), *About Autism*, <https://autisticadvocacy.org/about-asan/about-autism/> (last visited Sept. 30, 2024). Thus, many people with autism spectrum disorder can learn to communicate and interact in typical ways and can engage in normal, purposeful activities, if they are provided with individualized behavioral and education programs in natural family and community environments. As their interactive skills improve, repetitive and aggressive behaviors frequently diminish or disappear. On the other hand, if left without caring relationships and outward-directed activities, the person is likely to withdraw further into themselves. For more information about autism spectrum disorder, contact the Autism Society of America and its Wisconsin chapters. *See* [appendix 5B](#), *infra*, for related contact and website information.

D. Severe Traumatic Brain Injuries [§ 5.6]

Injury to the brain could have several causes, including accidental or intentional blows to the head; deprivation of oxygen, as in a near drowning; or a severe infection and fever. The brain is central to the body's physical and mental functions, and brain trauma can produce a wide variety of effects in the person. Although generalization is difficult, the following are frequent results of severe brain trauma; if severe and long-term, they could result in the need for guardianship, support services, or placement:

1. *Memory loss*: The person may lose the ability to remember names, learned skills, and even normal daily activities, to the point at which the person may need a system of cues and reminders or frequent supervision to carry out normal living activities.
2. *Communication barriers*: The person may lose reading ability or the ability to use language to communicate. As in some cases of stroke, the person may think normally but be unable to remember or communicate the words that go with the thought. The person may also have difficulty understanding what other people say.
3. *Lack of impulse control and emotional disability*: People with brain injuries may experience difficulty controlling impulses and emotions and thus may act on anger, desires, or whims without using good judgment or considering consequences. In some cases, frustration and inability to control anger may lead to sudden aggressive outbursts.

People with brain injuries often experience the added frustration of no longer being able to do things they could do before the trauma. Adjusting to new limits on capabilities and to being labeled *disabled* can be difficult. Frustration and depression are frequent results of this process. This problem is exacerbated by the current lack of specialized services for people with traumatic brain injuries and by the resentment that people with brain injuries might feel when they are classified and served with groups to which they feel they do not belong, such as people with an intellectual disability, mental illness, or degenerative brain disorder.

Information on causes, characteristics, and treatment of traumatic brain injuries is available from the National Institute of Neurological Disorders and Stroke at the National Institutes of Health, *Traumatic Brain Injury*, <https://www.ninds.nih.gov/health-information/disorders/traumatic-brain-injury-tbi> (last reviewed July 19, 2024).

E. Serious and Persistent Mental Illness [§ 5.7]

1. In General [§ 5.8]

Serious and persistent mental illness, defined in [Wis. Stat.](#) § 51.01(14t), refers to psychiatric illnesses and emotional disabilities that could require long-term, continuous treatment to enable the person to function in the community. A comprehensive discussion of

the nature, effects, and treatment of mental illness can be found in U.S. Department of Health & Human Services, *Mental Health: A Report of the Surgeon General* (1999), <https://profiles.nlm.nih.gov/spotlight/nn/catalog/nlm:nlmuid-101584932X120-doc> [hereinafter *Surgeon General's Report*].

Serious and persistent mental illness is a type of impairment that can be a ground for guardianship, if it results in a level of incapacity that meets the functional test for need for guardianship. It is also a type of impairment that can be a ground for an order for commitment, protective placement, or protective services. Guardians ad litem in protective placement or protective service proceedings involving people with mental illness will need to be sensitive to whether the person's primary need is for treatment and whether commitment is appropriate, either instead of or in addition to an order under [Wis. Stat.](#) ch. 55. See *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, [2012 WI 50](#), ¶¶ 31–36, [340 Wis. 2d 500](#), [814 N.W.2d 179](#) (citing and discussing *Milwaukee Cnty. Combined Cmty. Servs. Bd. v. Athans*, [107 Wis. 2d 331](#), 337, [320 N.W.2d 30](#) (Ct. App. 1982), and *C.J. v. State*, [120 Wis. 2d 355](#), [354 N.W.2d 219](#) (Ct. App. 1984)).

A mental commitment may be appropriate if an individual is a “proper subject of treatment” within the meaning of [Wis. Stat.](#) § 51.20(1), i.e., if the individual is capable of being rehabilitated. See [Wis. Stat.](#) § 51.01(17) (defining *treatment*); see also *Dane Cnty. v. Thomas F.W. (In re Mental Commitment of Thomas F.W.)*, No. [2014AP2469](#), 2015 WL 1823878, ¶ 20 (Wis. Ct. App. Apr. 23, 2015) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (ruling that when patient's treating psychiatrist testifies that patient has schizoaffective disorder treatable with antipsychotic medications, then that patient is “a proper subject for treatment under [Wis. Stat.](#) § 51.20(1)(a)”).

In ruling on a petition for commitment under [Wis. Stat.](#) ch. 51, the court “requires an inquiry into each individual's condition and potential for rehabilitation.” *Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, [2017 WI 57](#), ¶ 46, [375 Wis. 2d 542](#), [895 N.W.2d 783](#) (emphasis added).

If treatment will maximize the individual functioning and maintenance of the subject, but not help in controlling or improving their disorder, then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will go beyond controlling activity and will go to controlling the disorder and its symptoms, then the subject individual has rehabilitative potential, and is a proper subject for treatment.

Id. (quoting *Helen E.F.*, [2012 WI 50](#), ¶ 36, [340 Wis. 2d 500](#) (internal alterations, quotations, and citations omitted)).

Comment. Thus, in *J.W.J.*, the court again explored the statutorily undefined term *rehabilitation* in [Wis. Stat.](#) § 51.01(7), which it had addressed in *Helen E.F.* Whereas the court had determined that Helen E.F. had intractable Alzheimer's disease and therefore was not capable of rehabilitation, J.W.J.'s paranoid schizophrenia was capable of rehabilitation, and therefore the court determined that J.W.J. was appropriately subjected to commitment.

2. Types of Serious and Persistent Mental Illness [§ 5.9]

Many people with serious and persistent mental illness carry a diagnosis of *schizophrenia*. Typically, the onset of schizophrenia is in late adolescence or early adulthood, often when the person leaves home to begin a more independent life. It appears that schizophrenia results from a combination of physiological and environmental factors. In other words, people who develop schizophrenia have a physiological predisposition to the illness. The likelihood of schizophrenia manifesting itself and the severity of its symptoms are related both to the strength of the predisposition and to the level of stress in the person's environment. Moreover, it is likely that the diagnosis of schizophrenia refers to a group of several different illnesses, each having different causes.

Major characteristics of schizophrenia include the following:

1. A sensitivity to stress so that minor to moderate amounts of stress can lead to severe anxiety or loss of contact with reality;
2. Difficulty with interpersonal relationships, including difficulty forming close relationships, a tendency toward withdrawal, and excessive dependency;
3. Lack of energy and coping skills in work, social, and daily living activities, often resulting in lack of independent living and work skills, poor employment history, and poverty; and

4. A propensity, when stressed, to lose touch with reality and to develop symptoms of delusions—for example, people with schizophrenia may believe that they are controlled by the television or that they are famous historical or religious figures.

Not all people with schizophrenia experience all of these symptoms. With proper treatment and support, many people with schizophrenia can live very productive lives.

People with schizophrenia typically have phases of acute onsets of the disease and periods of stability. The acutely psychotic phase, when the person might lose touch with reality, is a time of great turmoil for the person and for family, friends, and support providers. In the stable phase, when the person is not psychotic and is in touch with reality, the person can live a relatively normal, fulfilling life. Even in the stable phase, however, the person still could have limitations, including high sensitivity to stress and difficulty with interpersonal relationships. Thus, ongoing support services can be crucial.

Until the development of psychotropic medications, people with severe schizophrenia frequently faced long-term institutionalization. Now, psychotropic medications have proved to be effective in reducing psychotic symptoms and helping people regain stability. In combination with a community support model of treatment and services, these medications have allowed many people to remain in or return to community settings and to enjoy a relatively high quality of life. At the same time, psychotropic medications have side effects, including involuntary rigidity or muscle tremor similar to symptoms of Parkinson's disease, which could adversely affect quality of life. Long-term use could lead to permanent, involuntary movements of oral and facial muscles, called *tardive dyskinesia*. For more information on the treatment of schizophrenia, see National Collaborating Centre for Mental Health, National Institute for Health & Clinical Excellence, *Psychosis and Schizophrenia in Adults (CG 178)* (issued Feb. 2014; corrected Mar. 2014; last reviewed Sept. 19, 2024), <https://guidance.nice.org.uk/CG178>.

Another common diagnosis for people with a serious and persistent mental illness is *bipolar mood disorder*. People labeled as having bipolar mood disorder typically experience recurrent episodes of mania and depression. During a manic episode, the person often experiences feelings of high energy and euphoria. The person might sleep very little, talk rapidly, and make impulsive decisions showing poor judgment and lack of contact with reality. During depression, the person experiences unhappiness, low energy, and lack of interest in usual activities, and might become suicidal. The symptoms of bipolar mood disorder can usually be controlled by long-term use of the drug lithium. Psychotherapy and other supportive services might also be helpful. For more information on the treatment of bipolar disorder see Am. Psychiatric Ass'n, *Practice Guideline for the Treatment of Patients with Bipolar Disorder* (2d ed. 2002), https://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/guidelines/bipolar.pdf. Although this resource has not been updated since it was published in 2002, it has been critiqued and modifications have been suggested. See Robert M.A. Hirschfeld, *Guideline Watch: Practice Guideline for the Treatment of Patients with Bipolar Disorder, 2nd Edition* (2005), https://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/guidelines/bipolar-watch.pdf.

Individuals who have experienced severe trauma or physical or sexual abuse might also be affected by very serious symptoms of mental illness, such as self-injury, depression, difficulty with stress and interpersonal relationships, eating disorders, and alcohol and other drug abuse.

Comment. Although the mental-health system has been slow to recognize the long-term effects of trauma and abuse, it is important to determine whether the person might have suffered abuse and to arrange for treatment that considers the role that past abuse could be playing in the person's current symptoms. An entire field, known as *trauma-informed care*, has developed in recent years. For more information, see Monique Tello, *Trauma-Informed Care: What It Is, and Why It's Important*, Harvard Health Publ'g: Harvard Health Blog (Oct. 16, 2018), <https://www.health.harvard.edu/blog/trauma-informed-care-what-it-is-and-why-its-important-2018101613562>.

3. Treatment and Support Services [§ 5.10]

In most forms of mental illness, medications can be helpful, but they do not cure mental illness; they only provide some control over symptoms. Many people with serious and persistent mental illness must continue to take medications for many years or for their whole lives to prevent recurrence of the more severe symptoms of their illness. However, the need for medication to control symptoms can be a problem for many people who suffer from mental illness. Some people might stop taking medications because they feel that they are well and the medications are a symbol of the illness, or because of real or perceived side effects. Other people prefer their symptoms to the feeling of loss of interest in life that they say the medication produces. See Ronald Diamond, *Drugs and Quality of Life: The Patient's Point of View*, 46(5) J. Clinical Psychiatry 29 (1985).

Treatment and support services for people with mental illness are closely related to the phases of the illness. When a mentally ill person is acutely psychotic, an increase in the level of supervision and support services might be necessary, including an increase in the level of medication. In some cases, hospitalization will be needed while the person is acutely psychotic. In many cases, however, a strong community support program can deliver needed services even in the acute phase of the illness, thus avoiding disruption in the person's living arrangements, activities, and relationships, which may be difficult to repair.

People who are in the nonacute phase of the illness can effectively be helped through ongoing services of a community support program. With very few exceptions, the need for long-term institutional care can be avoided with a good community support program. Community support programs provide the following:

1. Treatment and medications for symptoms of illness;
2. Rehabilitation aimed at helping people learn or maintain coping skills in social and family relationships, work, self-care, and living with ongoing symptoms of their illness;
3. Support services to help people get access to work, housing, medical care, and legal assistance, and to help people meet daily needs such as transportation, cooking, shopping, cleaning, and so forth; and
4. Crisis intervention to prevent or deal with acute phases of illness.

To be effective, community support programs must have a strong outreach component—they should not stop serving people who do not show up at an office or clinic. Programs must also be flexible enough to serve people who do not fit into standard service models. A major advantage of community support programs is that they can help people learn daily living, social, and work skills in the places where they will need to use those skills: in their homes, with friends and family, or on the job.

Increasingly, treatment and support services for people with mental illness are based on a “recovery” model. “Recovery” is not used in the sense of “cure.” Rather, it means an approach that is based on the idea that there is a realistic hope that a person with mental illness can minimize and cope with the effects of the illness and at the same time have a meaningful life. It focuses on restoring self-esteem and encouraging the person to set and pursue goals in relationships, work, and other meaningful roles in society, instead of focusing primarily on symptom relief. *See Surgeon General's Report, supra* § 5.8, at 97–100. SAMHSA provides information on mental-health services that are based on the goal of recovery and for which there is evidence of effectiveness. *See generally* SAMHSA, *Publications and Digital Products*, <https://store.samhsa.gov/> (last visited Sept. 30, 2024). Services found to have been effective include the following:

1. Illness management and recovery;
2. Assertive community treatment;
3. Family psychoeducation;
4. Supported employment; and
5. Integrated treatment for people who have both mental illness and a substance abuse addiction.

This recovery-focused approach recognizes that support services may need to be long-term or even lifelong. Some counties in Wisconsin, for example, offer a Medicaid-funded service, based on the recovery model, called Comprehensive Community Services (CCS) for Persons with Mental Disorders and Substance-Use Disorders. [Wis. Admin. Code](#) ch. DHS 36. Less intensive and intrusive than a traditional community support program, CCS programs provide a flexible array of individualized community-based psychosocial rehabilitation services to “consumers” with mental-health or substance-abuse issues. *See* [Wis. Admin. Code](#) § DHS 36.03(7) (defining *consumer* as “an individual who has been determined to need psychosocial rehabilitation services”).

F. Mental Disabilities Associated with Advanced Age [§ 5.11]

Normal changes in cognitive function occur as people age. There is often a decreased ability to concentrate, difficulty in comprehension, slower learning, and slower information retrieval caused by loss of neurons and decreased neurotransmitter activity. Some causes of cognitive impairments, such as Alzheimer's disease, and related dementias, like Friedreich's ataxia, Parkinson's disease, Huntington's chorea, Pick's disease, and Wilson's disease, are degenerative and irreversible, while others, such as delirium, depression, and hypothyroidism, are treatable or reversible. In addition, a stroke can cause substantial impairment of communication without affecting understanding and judgment. Thus, because there are so many conditions associated with aging that involve mental disability, a thorough initial assessment and periodic reassessment are essential to ensure accurate diagnosis and appropriate protective services, placement, or treatment.

Dementia is defined as a decline in cognitive function. Symptoms of dementia include gradual memory loss, impaired judgment, inability to perform routine tasks, and the loss of ability to use and understand words. Alzheimer's disease is the most prevalent form of dementia associated with aging (although it also occurs in younger adults). Alzheimer's produces progressive irreversible cognitive impairments and eventual physiological impairments in its victim.

In the early phases of Alzheimer's disease, subtle changes occur in cognition, personality, and functioning. The following changes are generally evident and progressive: short-term memory loss; shunning of unfamiliar surroundings and experiences; undue anxiety about physical health and routine activities; apathy; diminished motivation; mood swings; depression; indecisiveness; irritability; displays of indifference to normal courtesies and rituals; social withdrawal; poor judgment that causes unusual behavior; and, eventually, deterioration in daily living skills.

In the later and more severe stages of Alzheimer's disease, the individual's personality might be completely transformed with almost total memory loss, frequent wandering, and little or no recognition of familiar individuals. In these stages, the person sometimes has extreme difficulty with walking, talking, and swallowing, and might experience incontinence of urine and stool. Death occurs when people become so debilitated that they succumb to complications, such as pneumonia, severe strokes, and heart failure.

People with Alzheimer's disease show a broad variation in the types and severity of symptoms, in the sequence of the onset of symptoms, and in the rate of functional deterioration. The kinds and amounts of assistance that people need, therefore, can be expected to vary as cognitive and functional abilities deteriorate. Resources on source programs and approaches for Alzheimer's disease and other forms of dementia can be found on the website of the Wisconsin Department of Health Services (DHS), at <https://www.dhs.wisconsin.gov/dementia/family-caregiver-resources.htm> (last revised May 18, 2023).

The following are examples of the types of supports that could assist a person with Alzheimer's as the person's condition deteriorates:

1. Nurturing family relationships;
2. Supportive relationships outside the home;
3. Information about the disease and community resources;
4. Guidance about expected cognitive and functional losses;
5. Financial and legal planning for dealing with the costs of long-term care and the need for a guardian or substitute decision maker for health-care and financial decisions;
6. Supervision and protection;
7. Progressive assistance with the basic activities of daily living;
8. Financial assistance for community care; and
9. Health-care services.

In terms of importance and sequence, the person's primary need is for nurturing family relationships. The people living, working, or socializing with them should recognize that people with Alzheimer's are not without feelings. They experience a broad spectrum of

emotions—joy, satisfaction, pleasure, pain, and terror. Although these experiences may be only transitory, they are nevertheless real. The fact that a person with Alzheimer’s may not remember fear does not legitimize ignoring the fear. That a tender embrace may soon be forgotten does not mean that it is not experienced or enjoyed at that moment. Caregivers—whether they are family members, paid chore-workers, or other professional service providers—must understand and recognize needs and empathize with the person so that the person’s dignity and quality of life are enhanced. Recognizing the person’s enduring needs for understanding and empathy may help caregivers and service providers fashion programs and activities that elicit laughter and mirth and minimize situations or incidents that produce anxiety and add to bewilderment.

Common symptoms of Alzheimer’s disease, such as extreme confusion, wandering, and occasional aggressiveness, present a significant care management problem for caregivers. Although the use of chemical and physical restraints may help control Alzheimer’s patients, such restraints deny the person a supportive setting and are likely to increase fear and bewilderment. Caregivers have come to use such restraints in only rare circumstances. The development of residential facilities and units that specialize in dementia has resulted in improved supervision of residents by staff members trained in coping with Alzheimer’s disease and associated challenging behaviors in less invasive ways.

It is also important to recognize the amount of stress associated with being a caregiver for a person with Alzheimer’s disease, whether the caregiver is a family member or a paid support provider. This stress can lead to burnout, emotional and physical illness, and premature or unnecessary placement of the person with Alzheimer’s in a residential care facility. Further, extreme fatigue and stress may increase the risk of abuse or neglect, especially if other risk factors are present. In all programming for Alzheimer’s patients, efforts should be made to offer support to caregivers, including information, training, peer and professional counseling, respite care, and financial assistance when appropriate.

Alzheimer’s disease is a label given to a cluster of behaviors and symptoms. Other conditions also can produce a cluster of behaviors and symptoms similar or identical to those of Alzheimer’s disease, especially in its early stages. Many of these conditions, such as poor nutrition, dehydration, fluctuating blood sugars, thyroid deficiency, infection, or medication interactions or toxicity, are treatable or reversible. To reduce the possibility of misdiagnosis, a comprehensive assessment should be made of all people in whom Alzheimer’s is suspected. This assessment should include a physical examination, focused history and informant reports, laboratory tests, and a neurological evaluation. It should also include an intellectual evaluation and social and functional assessments. Periodic reassessment (at three- to six-month intervals) is needed to ensure that the initial diagnosis is accurate and to monitor the person’s changing cognitive and physical abilities. Incorrect diagnosis could result in a self-fulfilling expectation of deterioration and in loss of opportunities to obtain needed treatment.

In *Fond du Lac County v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, [2012 WI 50](#), ¶ 2, [340 Wis. 2d 500](#), [814 N.W.2d 179](#), the Wisconsin Supreme Court held that a patient, who had severe behavioral problems associated with Alzheimer’s disease, was not an appropriate subject for commitment under [Wis. Stat. ch. 51](#), because the individual was not an appropriate subject for treatment, as that term is defined in [Wis. Stat. ch. 51](#), even though there was evidence that medication could ameliorate some of the individual’s symptoms. The court held that the patient would be better served through a petition for protective services or placement under [Wis. Stat. ch. 55](#), which is more specifically designed to serve people with long-term support needs arising from degenerative brain disorders.

Comment. The majority opinion in *Helen E.F.* can be read to mean that Alzheimer’s disease is never treatable because it is not curable, but that a different result might occur in a case with different facts, e.g., a person with both a diagnosis of Alzheimer’s disease and a separate diagnosis of a major mental illness. The holding that a person with Alzheimer’s disease is not a proper subject for treatment for the purpose of commitment under [Wis. Stat. ch. 51](#) should not affect the person’s right to appropriate treatment and services under [Wis. Stat. § 51.61\(1\)\(f\)](#). See *infra* § [5.27](#). More recently, the Wisconsin Supreme Court emphasized that the inquiry into whether an individual is a proper subject for treatment should focus on the *individual’s* condition and potential for rehabilitation. *Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, [2017 WI 57](#), ¶ 46, [375 Wis. 2d 542](#), [895 N.W.2d 783](#) (affirming commitment of individual with paranoid schizophrenia); see also *Dane Cnty. v. Thomas F.W. (In re Mental Commitment of Thomas F.W.)*, No. [2014AP2469](#), 2015 WL 1823878, ¶ 20 (Wis. Ct. App. Apr. 23, 2015) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (holding that when patient’s treating psychiatrist testifies that patient has schizoaffective disorder treatable with antipsychotic medications, then that patient is “a proper subject for treatment under [Wis. Stat. § 51.20\(1\)\(a\)](#)”), [895 N.W.2d 783](#) (affirming commitment of individual with paranoid schizophrenia); see also *Dane Cnty. v. Thomas F.W. (In re Mental Commitment of Thomas F.W.)*, No. [2014AP2469](#), 2015 WL 1823878, ¶ 20 (Wis. Ct. App. Apr. 23, 2015) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (holding that when patient’s treating

psychiatrist testifies that patient has schizoaffective disorder treatable with antipsychotic medications, then that patient is “a proper subject for treatment under [Wis. Stat. § 51.20\(1\)\(a\)](#)”).

Another form of impairment associated with aging that has an identifiable cause is *stroke*. Strokes result from interference with the brain’s blood supply. The interference can be for a long or short period and can involve varying amounts of the brain’s blood supply. These factors determine whether the stroke will be minor and transient with no lasting effects; a major stroke leading to death; or one that a person survives, but with some level of disability. The effects of some strokes might necessitate guardianship, support services, or placement outside the home.

Impaired communication capability is a frequent complication of a stroke. Stroke victims can experience frustration, anger, and depression when, because of this impairment, interaction with others proves difficult. *Aphasia*, a common result of stroke, which literally means “without speech,” is highly variable and individual in both kind and degree and may involve speaking, reading, writing, and related skills. Occasionally, the condition is temporary and disappears within a matter of days or weeks. Often, rehabilitation associated with aphasia is prolonged and painfully slow. It can take months or years for people with aphasia to recover language skills. However, lack of communication skills does not necessarily indicate lack of understanding and judgment, and alternative means of communication can often be developed to allow the person to retain control of decision-making.

The existence and severity of most cognitive impairments associated with aging may be linked to environmental and situational factors. For example, evaluations are often performed in a period of major trauma and disruption in the person’s life, such as upon placement in a nursing home after hospitalization, or after the death of a spouse or a loved one. The person is likely to be experiencing temporary depression and confusion associated with illness, injury, or loss, increased dependence, and sudden changes of environment. If permanent institutional placements are made at this point, the person might have no home to which to return if the person recovers. Evaluations of people living in nursing homes or in isolation in their own homes might reflect the results of lack of activity, stimulation, and social interaction. These conditions are the exact opposite of what is needed to help a person use, retain, or regain intellectual abilities and interest in life. Indeed, such conditions could deepen depression and confusion.

An almost universal characteristic of people with severe, long-term disabilities, regardless of their age, is loss of skills, personal control, and status. People who were once active and in control of their lives might be forced to depend on others. This loss of control and status can itself contribute to depression and confusion. Therefore, any needed supervision and support should be delivered in ways that, to the greatest extent possible, allow people to continue to use their skills and abilities and to remain in control of or involved in decision-making.

G. Multiple Disabilities [§ 5.12]

People who have multiple disabilities present a special challenge to the human services system. Disabilities arise in all combinations; for example:

1. Intellectual disability is often associated with other conditions of the brain or central nervous system that result in hearing or visual impairments, or impairments of physical coordination, such as cerebral palsy.
2. People could have a dual diagnosis of intellectual disability and emotional disability or mental illness or may have a diagnosis of intellectual disability accompanied by challenging behaviors. *See infra* § [5.13](#).
3. Traumatic injuries, strokes, or old age could produce sensory and physical disabilities as well as mental disabilities.
4. Schizophrenia could occur in a person who also happens to be deaf, blind, physically disabled, or intellectually disabled.

People with multiple disabilities are challenging to the service system not only because they have multiple needs but also because services are often designed to serve people with one particular disability. For example, group homes for people with mental illness might not have staff members and residents with sign language ability, and as a result, a deaf resident would, in effect, be isolated. In addition, services for the person’s conditions may have to come from several different systems. Individualized service planning and strong case management are therefore particularly critical for persons with more than one disability.

H. Challenging Behaviors [§ 5.13]

Many people are in the protective services or protective placement system because of a combination of mental disability and challenging behaviors. These behaviors include physical aggression and self-injurious behaviors and may also include behavior that is not dangerous but that is seen as disruptive or socially inappropriate. People with challenging behaviors are often the people for whom it is most difficult to locate and obtain appropriate services. Many community services (and many institutions) have entrance criteria that exclude people with challenging behaviors. Often, these people fall between the cracks: programs for people with developmental disabilities or for elderly people might lack the staff and expertise to deal with severe behavioral or emotional problems, while programs for people with mental illness might not have staff with experience attempting to treat someone who is intellectually disabled or who has dementia.

Challenging behaviors can result from both internal and external factors. Internal causes could include the following:

1. *Poor control and understanding of emotions:* Some people always express anger the same way, regardless of the level of anger. Some people may misinterpret other people's feelings (especially negative feelings). Some people might act on emotions and impulses without considering consequences.
2. *Ineffective problem-solving skills:* When confronted with problems they cannot cope with, some people might respond by striking out or being self-abusive.
3. *Sensory, communication, and central nervous system deficits:* People might not take in, understand, or interpret information effectively, or they may be unable to communicate their feelings and needs. Challenging behaviors might result from fear, confusion, or frustration. Challenging behaviors might be a way of communicating dissatisfaction or may produce results that reinforce the person's behavior.
4. *Need for attention, affection, activity, physical contact:* If people are in situations in which they receive little attention, negative behavior might be an effective way of getting attention. The person might be reinforced in this behavior by the physical activity, physical contact, and ability to get a response from other people that often results from negative behavior.
5. *Sexual impulses:* Poor impulse control and lack of training and opportunity for normal sexual expression might lead to aggressive or inappropriate expression of sexuality.
6. *Hunger, thirst, fatigue, etc.:* Some people might express discomfort by shouting, refusing compliance with requests, or engaging in aggressive or destructive actions.

Many behavioral treatment programs focus solely on changing the person. Challenging behavior can also be attributed to external factors, such as the following:

1. Unrealistic expectations of the person on the part of other people;
2. Interruptions in an activity or in normal routine;
3. Bullying or teasing by other people;
4. Lack of visual, auditory, or tactile stimulation;
5. Excessive visual, auditory, or tactile stimulation;
6. Deprivation of normal experiences;
7. Environments that promote alienation and loneliness;
8. Environments that stigmatize the person or deny personal privacy and dignity; and
9. Inappropriate medications.

Good behavior-management programs can be successful in teaching people alternative, positive behaviors. An essential prerequisite to successful behavior management is participation in positive activities and programs. Too often, people with challenging behaviors are placed in institutional units that offer a highly regimented existence with very little opportunity for positive interaction. They are excluded from activity programs and are subjected to behavior-management programs that rely primarily on punishment. The result is often that the person gets attention from the staff only when engaging in negative behaviors, which are then punished; this is the only time anything interesting happens to the person. The person is trapped in a cycle: the lack of positive services and activities produces behavioral and emotional decay, which is met with punishment and continued denial of access to positive services and activities.

Most experts believe that punishment may not be effective in permanently changing behavior because the person exhibiting the behavior is likely to return to the behavior if the threat of punishment is removed. Most experts believe that behavior is most effectively and respectfully changed through providing the person with positive human relationships and activities, by respecting the person's attempts to communicate, and by trying to help the person communicate in more acceptable ways. See Edward G. Carr et al., *Communication-Based Intervention for Problem Behavior: A User's Guide for Producing Positive Change* (1994); Herbert Lovett, *Learning to Listen: Positive Approaches and People with Difficult Behavior* (1996).

It is not unusual to find behavioral treatment programs in effect for months or years even though the person shows no changes in behavior. At that point, it is important to question whether the program can ever work for the individual. Although lack of progress is often used as a reason to keep the person in a restrictive setting, this argument can be turned around to show that the setting is not in fact helping the person, and to ask whether, despite the behavior the program is trying to change, the person could, if supported, live and receive treatment in a less restrictive setting.

III. Defining Best Interests in Human Terms [§ 5.14]

A guardian ad litem's central role is to represent and advocate for the client's *best interests*.

The term "best interests" is not defined by statute. "Interests" is plural: all people have competing interests, and these will often be in conflict with each other, in the sense that a particular decision is likely to promote one interest at the expense of another. The goal is the best possible balance of competing interests. This section attempts to identify the factors involved in an analysis of best interests.

An excellent starting point for a best-interests analysis is provided by the statutory instructions on how guardians of the person must carry out their responsibilities. [Wis. Stat.](#) § 54.25(2)(d)3.a., b. That statute provides as follows:

In exercising powers and duties delegated to the guardian of the person under this paragraph, the guardian of the person shall, consistent with meeting the individual's essential requirements for health and safety and protecting the individual from abuse, exploitation, and neglect, do all of the following:

- a. Place the least possible restriction on the individual's personal liberty and exercise of constitutional and statutory rights, and promote the greatest possible integration of the individual into his or her community.
- b. Make diligent efforts to identify and honor the individual's preferences with respect to choice of place of living, personal liberty and mobility, choice of associates, communication with others, personal privacy, and choices related to sexual expression and procreation. In making a decision to act contrary to the individual's expressed wishes, the guardian shall take into account the individual's understanding of the nature and consequences of the decision, the level of risk involved, the value of the opportunity for the individual to develop decision-making skills, and the need of the individual for wider experience.

The guardianship statutes also contain a definition of "least restrictive," which, again, seeks to balance personal liberty, community integration, protection from harm, and care and treatment needs.

"Least restrictive" means that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect.

[Wis. Stat. § 54.01\(18\)](#).

These balancing tests, taken together, instruct the guardian to weigh and strike a balance between the person's interests in health and safety, freedom from abuse, personal liberty, legal rights, community integration, personal autonomy and choice, appropriate treatment and habilitation, and personal experience and growth. A similar balancing test is contained in the legislative intent section of [Wis. Stat. ch. 55](#), which governs implementation of protective services and placement and has also been applied by the courts to interpretation of the guardianship statutes. [Wis. Stat. § 55.001](#); see *State ex rel. Roberta S. v. Waukesha Cnty. Hum. Servs. Dep't*, [171 Wis. 2d 266](#), [491 N.W.2d 114](#) (Ct. App. 1992); *Zander v. County of Eau Claire (In re Guardianship & Protective Placement of Shaw)*, [87 Wis. 2d 503](#), [275 N.W.2d 143](#) (Ct. App. 1979); see also *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, [2012 WI 50](#), ¶ 11, [340 Wis. 2d 500](#), [814 N.W.2d 179](#).

Various statutory bills of rights are another source for the elements of a best interests analysis. These rights include those in [Wis. Stat. § 51.61](#) for individuals receiving services for mental illness, developmental disabilities, and substance abuse, or for individuals who are under protective service or protective placement orders, and the rights under [Wis. Stat. § 50.09](#) for residents of covered residential facilities. [Wis. Stat. § 54.18\(2\)\(b\)](#), in requiring a guardian to advocate for best interests, specifically includes an obligation to advocate for these rights, if applicable.

Another good starting point for a best-interests analysis of people with mental disabilities is a strong presumption that their interests are essentially the same as the interests of other people. Having a disability does not change a person's basic human needs and desires, although the person may need special support to meet those needs and desires. Far too often, society has accepted segregation, substandard living conditions, lack of personal relationships, and enforced inactivity as things that are natural for people with disabilities.

Thus, when the legal or human services systems intervene in people's lives, they should use methods and have goals that most people would see as positive for themselves. This approach is expressed by the principle of *normalization* in human services, defined as "[u]tilization of means which are as culturally normative as possible in order to establish and/or maintain personal behaviors and characteristics that are as culturally normative as possible." Wolf Wolfensberger, *The Principle of Normalization in Human Services* 28 (1972); see also John O'Brien, *The Genius of the Principle of Normalization* (1999), <https://files.eric.ed.gov/fulltext/ED456601.pdf>.

A central observation underlying the principle of normalization is that our expectations of people are often self-fulfilling. People with mental disabilities are often the victims of negative stereotypes created by society and then reinforced by the way society treats them. To avoid this effect, the goal should be to provide supports, protections, places to live, and things to do that present people in positive ways. For example, if society chooses to provide a person with residential support services in an institution apart from the person's community, it sends the message that the person cannot live in a normal home, is different from others, and needs to be separated from the community. People are much more likely to see the mentally disabled person positively and to want to get to know the person if the person can be supported in a home or apartment like those other people live in.

For a guardian ad litem to determine what is in the client's best interests, it is useful for the guardian ad litem to look at the components of what most people in American society would consider to be a valued life and evaluate how the ways in which supervision and services are delivered to a particular person with mental disabilities can defeat or enhance these components. This process helps the guardian ad litem, as someone who is not a human services professional, to review professional evaluations and service recommendations from the client's perspective and ensure that the client's basic human interests are not ignored or unnecessarily sacrificed. Explaining the person's interests in basic human terms helps to give meaning to legal concepts like "adequate ... services appropriate for [the person's] condition," [Wis. Stat. § 51.61\(1\)\(f\)](#), and "least restrictive conditions," [Wis. Stat. § 51.61\(1\)\(e\)](#).

Analyzing the person's interests in basic human terms is also useful to the guardian ad litem in organizing and presenting the guardian ad litem's recommendation to the court. It is easy to say that a community-living arrangement is less restrictive than the unnecessary use of an institution. However, it is far more powerful to demonstrate the impact of the two placements on continuity in the person's life and on the person's community contact, family ties, personal image, and use and development of skills.

The following list provides one way of looking at the essential components of what most people in American society would consider a worthwhile life.

Note. Similar lists of valued outcomes form the basis of assessments for long-term support services in Wisconsin. See [Wis. Admin. Code](#) § DHS 10.44(2)(e) (governing assessments of care management organizations (CMOs) for Family Care). An updated DHS *Medicaid Home and Community-Based Services (HCBS) Waiver Manual for the CLTS Waiver Program* (May 2024) [hereinafter *Medicaid Waiver Manual*] is at <https://www.dhs.wisconsin.gov/publications/p02256.pdf>.

1. *Personal autonomy and choice:* Most people value having control over choices affecting their lives, such as where to live and with whom, whom to befriend, how to spend their money, and what to have for lunch. If people need support services, most people value control over the form of services, and who provides them.
2. *Being healthy, safe, and comfortable; being free from abuse:* Most people value physical and mental health and safety and enjoy comfortable clothing, good food, and pleasant surroundings.
3. *Being part of a community:* Most people choose to live, shop, work, and enjoy themselves in ordinary neighborhoods and communities. Forced exclusion from the community is the typical punishment for crime.
4. *Sharing relationships:* Relationships with other people are central to most people's lives, and most people would view a lack of family ties and close friendships as a personal tragedy. Most people also value relationships with a wide variety of people, such as neighbors, work associates, and members of the community.
5. *Learning and having the opportunity to be self-sufficient, active, and productive:* Most people in our society place great value on being independent and on learning and using skills. Most adults in our society engage in work in some form and depend for their feelings of self-worth on their ability to be productive. Most people want interesting work and leisure activities, and find long periods of enforced inactivity frustrating and boring.
6. *Having continuity in relationships, environment, and experiences:* Most people value maintaining family ties and friendships, having a stable home and community, and building new skills on ones previously learned. This does not mean that people do not progress and change. People move, develop new relationships, and change jobs, but for most people this is a way of reaching other goals and a matter of choice. Rarely do people suddenly cut off all past ties to family, friends, places, and activities.
7. *Having a good reputation:* Most adults want to be thought of as respected, productive, mature, valued members of the community. In large part, this involves having (and being seen to have) as many of the other components of a valued life as possible. A person whose basic human interests are ignored is damaged twice: once by the denial of the interest itself and once by the message that the denial sends to other people about the person's status in society.

A good assessment of support needs will address the values in this list. In any real-life situation, there will be conflict and overlap among the components. For example, teaching the person skills to maintain a good appearance may limit freedom of choice but promote the opportunity to be part of the community and have relationships. The question is whether a good balance has been struck.

IV. Guardianship [§ 5.15]

A. Overview [§ 5.16]

Note. Materials on a wide range of guardianship issues can be found on the Wisconsin Guardianship Support Center's website at <https://gwaar.org/guardianship-resources> (last visited Sept. 30, 2024). See also Roy Froemming, Wis. Dep't of Health Servs., *Guardianship of Adults* (2011), <https://www.dhs.wisconsin.gov/publications/p2/p20460.pdf>, and Roy Froemming, Wis. Dep't of Health & Family Servs., *Chapter 55: Application of Wisconsin Adult Protective Services Law and Adults-at-Risk Related Statutes* (2007), <https://www.dhs.wisconsin.gov/publications/p2/p20460a.pdf> [hereinafter Froemming, *Adult Protective Services and Adults-at-Risk*], which contain more detail on alternatives to guardians, guardianship powers, medical decision-making, and other issues. Another useful publication is Maren Beermann, [Guardianship & Protective Placement for Older Adults in Wisconsin](#) (State Bar of Wisconsin 5th ed. 2023).

Decision-making is a functional skill. Guardianship of an adult is one form of decision-making support for a person whose ability to make and communicate decisions is impaired. Wisconsin's guardianship law provides a functional test grounded in decisional capacity. See generally [Wis. Stat.](#) ch. 54.

Under [Wis. Stat.](#) § 54.10(3)(a), a court may order guardianship based on incompetence only if the individual has a listed impairment, [Wis. Stat.](#) § 54.01(14) (defining *impairment* as “developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities”), is “unable effectively to receive and evaluate information or ... communicate decisions,” and the inability results in a significant functional impact, either on health and safety (for guardianship of the person) or on protection and application of property for support (for guardianship of the estate). [Wis. Stat.](#) § 54.10(3)(a)1.–3.

Use of guardianship must be considered among the full range of possible decision-making supports and should be used only when it is the least restrictive alternative. See [Wis. Stat.](#) § 54.01(18) (defining *least restrictive*). See section [5.14](#), *supra*, for the full text of the statutory definition. A court may appoint a guardian only if “[t]he individual’s need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, a supported decision-making agreement under [[Wis. Stat.](#)] ch. 52 or other means that the individual will accept.” [Wis. Stat.](#) § 54.10(3)(a)4.

Guardianship is a relatively drastic form of support: the adult’s authority to make decisions over one or more aspects of their own life is taken away and either lost entirely, [Wis. Stat.](#) § 54.25(2)(c), or transferred to the guardian, [Wis. Stat.](#) § 54.25(2)(d). Whether a person needs guardianship, or whether some other form of decision-making support may be effective and less restrictive, may depend on several factors, which relate not only to the person’s abilities, but also to their life circumstances and willingness to cooperate with voluntary supports. A person integrated in their own community with a strong network of family and social supports is likely to be better able to meet their needs for decision-making support without a guardian than someone with similar abilities who is in an isolated situation, or a situation dominated by one individual or service provider. The statute contains an open-ended list of factors, in addition to cognitive ability, that the court must consider in determining a person’s need for guardianship. [Wis. Stat.](#) § 54.10(3)(c). These factors will not apply to every person in every case, but, when they are relevant, the court must consider them.

In a citable, unpublished decision, considering the relevance of any existing advance planning documents in a guardianship proceeding, the Wisconsin Court of Appeals said:

No statute or case requires the trial court to disregard guardianship in favor of powers of attorney. All of the relevant guardianship and powers of attorney statutes, and case law, make clear that the trial court *must consider* all relevant evidence, including the existence of powers of attorney, but also many other factors, and then determine what is in the proposed ward’s *best interest*. The statutes give the trial court the discretion to dismiss the guardianship petition if it is unnecessary due to validly executed powers of attorney, or to limit or revoke the powers of attorney in favor of guardianship if good cause is shown.

E.C. v. Krueger (In re Guardianship of E.C.), No. [2015AP2196](#), 2016 WL 7234737, ¶ 29 (Wis. Ct. App. Dec. 13, 2016) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (affirming circuit court’s decision to suspend proposed ward’s powers of attorney).

B. Tailoring Guardianships to Individual Needs [§ 5.17]

Note. The guardian ad litem is not an evaluator or expert witness but may need to make a judgment about whether it is in the person’s best interests for the person to make the person’s own decisions in some or all areas of decision making. A very useful guide to attorneys in making this kind of judgment is ABA Comm’n on L. & Aging & Am. Psychological Ass’n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2d ed. 2021), <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> [hereinafter *Assessment of Older Adults Handbook*]. While specifically aimed at attorneys working with older adults, the ideas in the handbook can be applied to other people with impaired decision-making abilities.

Guardianship, like any functional support services, should be no more restrictive than is necessary to meet the person’s functional needs. No person should lose decision-making control in an area in which the person is able to understand the risks and benefits involved and make a reasoned decision. Giving a guardian authority in areas in which the ward could safely exercise control independently or with informal support has two negative side effects: it sets up the person and guardian for unnecessary conflict, and it deprives the person of the opportunity to exercise decision-making skills, which could help build or retain those skills. Even when the court gives ultimate control over a decision to a guardian, the person subject to the guardianship retains an interest in being involved in the process of making decisions and in having the person’s preferences known and respected.

When the court orders guardianship, the court will limit the guardian's powers to those that the individual lacks capacity to exercise competently. The powers of the guardian are limited to those listed in the court order, and the individual retains all other rights. The court order may give a guardian only those powers necessary to provide for the personal needs or property management of the individual, in a manner that is appropriate to the individual and that constitutes the least restrictive form of intervention. [Wis. Stat. § 54.18\(1\)](#).

An individual subject to guardianship of the person retains many basic civil rights in all cases, [Wis. Stat. § 54.25\(2\)\(b\)](#), and loses other rights and powers only if explicitly listed in the court order creating the guardianship based on a specific finding by the court of incapacity to exercise the right or power. [Wis. Stat. § 54.25\(2\)\(c\)](#), (d). This means that evaluations must provide a basis for each finding of incapacity, and the guardian ad litem must make a conscious decision about whether to question the adequacy of the evidence indicating incompetence in an area in which decision-making power is being taken from the person.

Under [Wis. Stat. § 54.25\(2\)\(c\)](#), the court may declare that the person lacks capacity to exercise certain personal rights, which cannot be exercised on the person's behalf by a guardian. If no finding is made, the individual retains the right. The rights under this section, and possible standards that could apply to a determination of capacity, are as follows:

1. *Right to consent to marriage.* "Marriage ... is a civil contract, to which the consent of the parties capable in law of contracting is essential." [Wis. Stat. § 765.01](#). The test of capacity should be whether the person understands the nature and consequences of marriage.
2. *Right to execute a will.* Under Wisconsin case law, a testator must have mental capacity to have a meaningful understanding of what the testator owns, the testator's relationship to likely beneficiaries, and the effect of the will the testator is signing. *Gittel v. Abram (In re Est. of Persha)*, 2002 WI App 113, ¶ 40, 255 Wis. 2d 767, 649 N.W.2d 661. The courts have also recognized that people under guardianship may have capacity to sign a will, either in general or during lucid intervals. *Sorensen v. Ziemke (In re Est. of Sorensen)*, 87 Wis. 2d 339, 345–46, 274 N.W.2d 694 (1979).
3. *Right to serve on a jury.* A juror must be able to understand the English language. [Wis. Stat. § 756.02](#). A court may excuse a juror if it finds that the person "cannot fulfill the responsibilities of a juror." [Wis. Stat. § 756.03\(1\)](#).
4. *Right to apply for licenses.* The guardianship statute itself sets a standard: This right may be removed "if the court finds that the individual is incapable of understanding the nature and risks of the licensed or credentialed activity, to the extent that engaging in the activity would pose a substantial risk of physical harm to the individual or others." [Wis. Stat. § 54.25\(2\)\(c\)1.d](#).
5. *Right to consent to sterilization.* The guardianship statute itself sets an informed-consent standard. [Wis. Stat. § 54.25\(2\)\(c\)1.e](#). The court may declare an individual incompetent to exercise this right if the court finds "that the individual is incapable of understanding the nature, risk, and benefits of sterilization, after the nature, risk, and benefits have been presented in a form that the individual is most likely to understand."
6. *Right to consent to organ, tissue, or bone-marrow donation.* [Wis. Stat. § 54.25\(2\)\(c\)1.f](#). does not state a standard for determining capacity to exercise this right, although an informed-consent standard, such as the one explicitly provided for determining capacity to consent to sterilization, seems appropriate. This is a particularly difficult capacity to evaluate, except in the context of a particular decision.

Note. A case decided before the creation of [Wis. Stat. § 54.25\(2\)\(c\)1.f](#). held that neither a guardian nor a court in Wisconsin could consent on the ward's behalf to organ donation. *Lausier v. Pescinski (In re Guardianship of Pescinski)*, 67 Wis. 2d 4, 8, 226 N.W.2d 180 (1975).

7. *Right to vote.* The standard for incapacity to vote is that the person must be "incapable of understanding the objective of the elective process." [Wis. Stat. § 54.25\(2\)\(c\)1.g.](#); see also [Wis. Stat. § 6.03](#) (disqualification of electors).

Comment. [Wis. Stat. § 54.25\(2\)\(a\)](#) states that the individual retains a right in the absence of a finding of incapacity to exercise that specific right. This is true for the right to vote. See [Wis. Stat. § 6.03\(3\)](#). For other rights, however, the absence of a finding of clear and convincing evidence of incapacity is not the same as an affirmative finding of actual capacity and cannot predict future actual capacity, e.g., to make a will or give informed consent at some future time. In many cases, a specific finding of capacity to

make a decision in a particular context would be more useful. Such an order might be obtainable under the court's authority to review incompetency under [Wis. Stat. § 54.64](#).

The guardianship statutes recognize that some individuals may have capacity to exercise some personal rights in some circumstances but not in others. In those cases, the court may order that the individual may exercise the rights to marry, apply for licenses, consent to sterilization, or consent to organ, tissue, or bone-marrow donation only with concurrent consent of the guardian. [Wis. Stat. § 54.25\(2\)\(c\)3](#). This puts the guardian in the position not only of making a best-interests determination, but also of deciding to the guardian's own satisfaction that the individual's consent is valid. In many cases, guardians may want a professional opinion, e.g., from a mental-health professional, that the individual has capacity to make a particular decision in a particular context, and that the individual is making the decision voluntarily.

In ordering guardianship of the person, the court must specify the powers being given to the guardian, and may only give a power to a guardian if (1) the person lacks evaluative capacity to exercise it; (2) the power is necessary to provide for the individual's personal needs, safety, and rights; and (3) grant of the power to a guardian is the least restrictive form of intervention. [Wis. Stat. § 54.25\(2\)\(d\)](#). The statute, *see* [Wis. Stat. § 54.25\(2\)\(d\)2.](#), contains an open-ended list of powers that may be given to a guardian of the person, including but not limited to the following:

1. Power to give informed consent to medical examination, treatment (including research and experimental treatment), and medication, *see generally infra* §§ [5.19–20](#);

Note. Under [Wis. Stat. § 54.25\(2\)\(d\)2.ab. and ac.](#), a guardian's powers to consent to psychiatric treatment and psychotropic medication remain subject to [Wis. Stat. ch. 51](#) and the individual's right to refuse, as discussed in section [5.20](#), *infra*.

2. Power to give informed consent to receipt of social and supported living services;
3. Power to make decisions about educational and vocational placement and support services or employment;
4. Power to choose providers of medical, social, and supported living services;
5. Power to give informed consent to release of confidential records other than court, treatment, and health-care records and to redisclosure as appropriate;
6. Power to make decisions related to mobility and travel;
7. Power to make a decision to petition for termination of marriage;
8. Power to receive notices on behalf of the ward;
9. Power to act as an advocate in proceedings;
10. Power to petition for protective placement or commitment;
11. Power to have custody of the ward; and

Note. "Custody" of an adult is not defined in [Wis. Stat. ch. 54](#). The court of appeals, however, has provided a definition of *custody* in the context of protective placement under [Wis. Stat. ch. 55](#). *Jackson Cnty. Dep't of Health & Hum. Servs. v. Susan H. (In re Protective Placement of Susan H.)*, [2010 WI App 82](#), [326 Wis. 2d 246](#), [785 N.W.2d 677](#). The court took into account the statutory purpose of protecting the individual from abuse, financial exploitation, neglect, and self-neglect, *see* [Wis. Stat. § 55.001](#), and concluded that "the meaning of 'custody' in [[Wis. Stat. § 55.08\(1\)\(a\)](#)] means control and supervision in order to provide this protection." *Susan H.*, [2010 WI App 82](#), ¶ 14, [326 Wis. 2d 246](#). When there is a known, definable risk, it may be more useful for a court order to specify powers—such as power to make decisions about mobility, power to make decisions about residential placement, or power to make decisions about private visitors—rather than to rely on a general order giving the guardian "custody."

12. Any other power the court may specifically identify.

At least some powers—for example, the power to file grievances or petitions with government agencies and courts—can be held concurrently by the guardian and the ward. See [Wis. Stat.](#) § 54.25(2)(b) (listing rights retained by individuals who are determined incompetent), (d)2. (powers that may be assigned to guardian).

The guardianship statutes clearly authorize the court to limit a guardianship of the estate and require the court to limit the powers granted to those that are needed to provide for property and financial management and that constitute the least restrictive intervention. [Wis. Stat.](#) §§ 54.18(1), 54.19, 54.20(1). However, [Wis. Stat.](#) ch. 54 does not contain a list of specific rights that can be retained by a person who is subject to a limited guardianship of the estate. Examples of rights that may be appropriate for retention include the following:

1. *Right to enter into contracts.* This is often limited by a dollar amount for any one transaction.
2. *Right to hold, manage, or convey property.* For example, control of major resources sufficient to provide for the person's needs and protect the person from financial exploitation could be given to the guardian, with the individual retaining control of all other property.
3. *Right to receive and manage some items of income.* These items most commonly include earnings from work or from disability or retirement benefits.

An adult ward, a guardian, or any person acting on the ward's behalf may bring a petition under [Wis. Stat.](#) § 54.64 to restore rights for a person under guardianship. This may be appropriate if the person has gained skills or recovered, but it also may be appropriate in the context of a specific decision faced by the person, such as a decision to seek sterilization or an abortion. A petition to further restrict the rights of an individual under a guardianship can be brought under [Wis. Stat.](#) § 54.63.

C. Conduct of Guardian; Removal; Supervisory Orders [§ 5.18]

[Wis. Stat.](#) § 54.18 sets a very high standard for all guardians. A guardian must do the following:

1. Exercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in the person's own affairs.
2. Advocate for the ward's best interests, including applicable rights under [Wis. Stat.](#) §§ 50.09 and 51.61.
3. Exhibit the utmost degree of trustworthiness, loyalty, and fidelity in relation to the ward.

[Wis. Stat.](#) § 54.18(2)(a)–(c).

In addition, a guardian of the estate must exercise the judgment and care of a person of discretion and intelligence, consider the ward's personal preferences with regard to daily living, and consider the least restrictive form of intervention. [Wis. Stat.](#) § 54.20(1); cf. [Wis. Stat.](#) § 54.01(11) (defining *guardian of the estate* as “a guardian appointed to comply with the duties specified in [[Wis. Stat.](#) §] 54.19 and to exercise any of the powers specified in [[Wis. Stat.](#) §] 54.20”).

A guardian of the person must do the following:

1. Make an annual report to the court and designated county protective services department, covering the location of the ward, the health condition of the ward, any recommendations regarding the ward, and whether the ward is living in the least restrictive environment consistent with the needs of the ward. [Wis. Stat.](#) § 54.25(1)(a).
2. Endeavor to secure any necessary care or services for the ward that are in the ward's best interests, based on all of the following:
 - a. Regular inspection, in person, of the ward's condition, surroundings, and treatment;
 - b. Examination of the ward's health-care records and treatment records and authorization for redisclosure, as appropriate;

- c. Attendance and participation in staff meetings of any facility in which the ward resides or is a patient, if the meeting includes a discussion of the ward's treatment and care;
- d. Inquiry into the risks and benefits of, and alternatives to, treatment for the ward, particularly if drastic or restrictive treatment is proposed; and
- e. Specific consultation with providers of health-care and social services in making all necessary treatment decisions.

[Wis. Stat.](#) § 54.25(1)(b); *cf.* [Wis. Stat.](#) § 54.01(12) (defining *guardian of the person* as “a guardian appointed to comply with the duties specified in [[Wis. Stat.](#) §] 54.25(1) and to exercise any of the powers specified in [[Wis. Stat.](#) §] 54.25(2)”).

In addition, in exercising powers and duties delegated under [Wis. Stat.](#) § 54.25(2)(d), the guardian of the person must, consistent with meeting the individual's essential requirements for health and safety and protecting the individual from abuse, exploitation, and neglect, do all of the following:

1. Place the least possible restriction on personal liberty and exercise of rights, and promote the greatest possible integration into the community. [Wis. Stat.](#) § 54.25(2)(d)3.a.
2. “Make diligent efforts to identify and honor the individual's preferences with respect to choice of place of living, personal liberty and mobility, choice of associates, communication with others, personal privacy, and choices related to sexual expression and procreation. In making a decision to act contrary to the individual's expressed wishes, the guardian shall take into account the individual's understanding of the nature and consequences of the decision, the level of risk involved, the value of the opportunity for the individual to develop decision-making skills, and the need of the individual for wider experience.” [Wis. Stat.](#) § 54.25(2)(d)3.b.
3. “Consider whether the ward's estate is sufficient to pay for the needed services.” [Wis. Stat.](#) § 54.25(2)(d)3.c.

Effectively, [Wis. Stat.](#) ch. 54 sets two standards of conduct—one for civil liability, and one for court oversight of the guardian. While a guardian is immune from personal civil liability if the guardian acts in good faith, in the ward's best interests, and with the degree of diligence and prudence that an ordinarily prudent person exercises in the person's own affairs, [Wis. Stat.](#) § 54.18(4), the guardian can be removed or made subject to a supervisory order of the court under the procedure in [Wis. Stat.](#) § 54.68 for a list of acts or failures, including failing to perform any of the duties of a guardian listed above. This is consistent with prior case law that removal of a guardian is based on best interests of the ward, that a guardian owes a fiduciary duty and “absolute fidelity” to the ward, and that guardianship status is a privilege, not a legal right. *See, e.g., Winnebago Cnty. v. Harold W. (In re Guardianship of Tina Marie W.), 215 Wis. 2d 523, 528–29, 573 N.W.2d 207 (Ct. App. 1997).*

The provisions of [Wis. Stat.](#) ch. 54 expect that guardians will be willing to take time to know the person, stay updated on the person's situation and needs, and act as an active advocate. These standards can be difficult to meet if the guardian does not live near the ward. Courts will have to determine what is meant by “regular” in-person inspection, *see* [Wis. Stat.](#) § 54.25(1)(b)1., and then balance the frequency of personal contact against the benefit of a guardian who may not be physically present but may know the person well and have other effective ways of staying informed about the person's situation.

D. Medical Decision-Making [§ 5.19]

A court order establishing or amending a guardianship may give the guardian power to give informed consent to voluntary or involuntary medical examination and treatment. [Wis. Stat.](#) § 54.25(2)(d)2.ab. (governing voluntary treatment), ac. (governing involuntary treatment). The limitations on this power with regard to consent to mental-health treatment and psychotropic medications are discussed in section [5.20, infra](#). This section discusses limitations on a guardian's power regarding consent to research that might not benefit the person, experimental treatment, end-of-life decision-making, and sterilization and abortion. These are issues in which the guardian ad litem may be involved in separate proceedings to authorize the guardian to give consent.

Unless a showing is made, by clear and convincing evidence, of a general objection by the ward to research, the court may give the guardian power to consent to participation by the ward in research that might help the ward, or in research that might help others and involves no more than minimal risk to the ward. [Wis. Stat.](#) § 54.25(2)(d)2.b. The court could grant this power as part of the general powers of a guardian, even if no specific research project is being considered.

The court may give the guardian power to consent to participation by the ward in research that might not help the ward and might help others, but that involves more than minimal risk to the ward, only if the guardian can establish, by clear and convincing evidence, that the person would have elected to participate in it and that the statute's requirements for review of the research by a human rights committee have been met. [Wis. Stat. § 54.25\(2\)\(d\)2.c.](#) The committee's determination is fact specific and appears to be one that can be made only in the context of a request for authority to consent to a particular research project.

Unless a showing is made, by clear and convincing evidence, of a general objection by the ward to experimental treatment, the court may give the guardian power to consent to experimental treatment, but only if the court finds that the treatment may be lifesaving, other reasonable traditional alternatives have been exhausted, two physicians recommend it, and it is in the ward's best interests. [Wis. Stat. § 54.25\(2\)\(d\)2.d.](#) Experimental mental-health treatment may require concurrent consent of the individual. *See infra* [§ 5.20](#).

Practice Tip. [Wis. Stat. § 54.25\(2\)\(d\)2.c.](#) and [Wis. Stat. § 54.25\(2\)\(d\)2.d.](#) present a problem in completing the guardianship order. Simply giving the powers to the guardian seems inappropriate, because court approval is needed of all consents. Leaving the sections blank on the order, however, may look like a finding that the person has capacity to give consent. One way to deal with this is to state in the order that the person lacks capacity, but then to note in the order that case-by-case court approval is required for guardian consent.

The authority of a guardian to refuse or withdraw consent for life-prolonging treatment is governed by case law. The Wisconsin Supreme Court held, in *Lenz v. L.E. Phillips Career Development Center (In re Guardianship of L.W.)*, [167 Wis. 2d 53](#), 63, [482 N.W.2d 60](#) (1992), that an incompetent person in a persistent vegetative state (PVS) has the right to refuse unwanted medical treatment, including nutrition and hydration. *Id.* A guardian may consent to withdrawal of life-sustaining treatment when doing so is in the best interests of the ward. *Id.* Prior authority of a court is not needed, but court review is available to parties in interest. *Id.*

The court in *L.W.* held that the right to refuse treatment arises out of the common-law right to self-determination and out of liberty interests protected by the U.S. Const. amend. XIV and Wis. Const. art. I, § 1. *Id.* at 68–69. A person who is incompetent retains these rights. *Id.* at 74. Wisconsin common law requires the decision to be made by a surrogate decision maker acting in the person's best interests. *Id.* at 75–76. When the person's wishes under the circumstances are clearly established, it is in the person's best interests for those wishes to be carried out. When the person's wishes are not clearly established, it is presumed that continued life is in the person's best interests, but this presumption can be overcome. Factors in determining best interests include loss of dignity occasioned by the treatment and condition, life expectancy, prognosis, and the risks, side effects, and benefits of the treatment options. *Id.* at 86–88 (citing *In re Conroy*, [486 A.2d 1209](#) (N.J. 1985)). General considerations of quality of life should not enter the decision. *Id.* at 88.

The *L.W.* court specifically limited its decision to persons in a PVS and required confirmation of the PVS diagnosis by two independent physicians. *Id.* at 84. The case left open the question whether family members have authority to make decisions about life-sustaining treatment in the absence of legal guardianship proceedings. The court noted that there is a "society sanctioned practice" that most of these decisions are made by family members and physicians. *Id.* at 85–86 n.16. *But cf. Conroy*, [486 A.2d](#) at 1240 (allowing termination of treatment for terminally ill person not in PVS, but holding that, at least for nursing home residents, these decisions require legal determination of incompetence and court-appointed guardian).

In an unpublished opinion dealing with the authority of guardians, the rights of incompetent patients, and the obligations of doctors concerning decisions about the right to refuse or receive life-sustaining treatment, the Wisconsin Court of Appeals held that doctors have a duty to comply with standards of medical ethics. *Disability Rights Wis. v. University of Wis. Hosp. & Clinics*, No. [2014AP135](#), 2014 WL 6977869, ¶ 21 (Wis. Ct. App. Dec. 11, 2014) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)); *see also infra* [§ 5.30](#).

In *Spahn v. Eisenberg (In re Guardianship & Protective Placement of Edna M.F.)*, [210 Wis. 2d 557](#), [563 N.W.2d 485](#) (1997), involving a ward who was not in a PVS but was in the advanced stages of Alzheimer's disease, the supreme court refused to authorize withdrawal of artificial nutrition by a guardian when there was not clear and convincing evidence of what the ward would have wanted under the circumstances.

In *Disability Rights Wisconsin*, the court of appeals limited *Spahn* by finding that the case had "nothing pertinent to say on the topic of doctor obligations" concerning the right to refuse treatment in guardianship situations. *Disability Rights Wis.*, 2014 WL 6977869, ¶ 24.

It is common, in reviewing records of health-care facilities, to encounter “do not treat” or “do not resuscitate” (DNR) orders signed by guardians for people who are not in a PVS and do not meet the limited statutory conditions for a DNR order under [Wis. Stat. § 154.19](#). This statute allows DNR orders to be issued by “health care professionals,” not just physicians. See [Wis. Stat. § 154.01\(3\)](#) (defining *health care professional* to include licensed physicians, physician’s assistants, and advanced practice registered nurses). To the extent that these orders do not reflect known wishes of the individual, they can conflict with the best-interests presumptions created by Wisconsin case law.

Regarding sterilization, [Wis. Stat. § 54.25\(2\)\(c\)](#) i.e. follows the holding in *Eberhardy v. Circuit Court (In re Guardianship of Eberhardy)*, [102 Wis. 2d 539](#), [307 N.W.2d 881](#) (1981), that a guardian has no power to consent to sterilization of a ward under Wisconsin law, with or without court approval. Accordingly, the sole route to consent to a procedure that has the primary purpose of sterilization is to restore the individual’s right to consent, by showing that the individual is capable of understanding the nature, risk, and benefits of sterilization, after the nature, risk, and benefits have been presented in a form that the individual is most likely to understand. If the person is found able to consent, the court may also require concurrent consent of the guardian. See [Wis. Stat. § 54.25\(2\)\(c\)3](#). The testimony of a counselor who has worked with the ward over time and can testify to the ward’s understanding may be helpful. [Wis. Stat. ch. 54](#) is silent on the issue of consent to abortion, but clearly this is a power that could be specifically reserved for exercise by an individual able to exercise it. Even when the individual is not capable of informed consent, her wishes may carry great weight, given the statutory requirement of respect for expressed wishes related to protected constitutional rights in [Wis. Stat. § 54.25\(2\)\(b\)7](#). and (d)3.

E. Involuntary Treatment and Medication for Mental Illness [§ 5.20]

Competent adults, regardless of mental disability, have a right to refuse medication and other treatment. [Wis. Stat. § 51.61\(1\)\(g\)](#). The Wisconsin Supreme Court, in *State ex rel. Jones v. Gerhardstein*, [141 Wis. 2d 710](#), 745, [416 N.W.2d 883](#) (1987), held that, even for a person under commitment, the right to refuse medical treatment can be overridden only if there is a court finding that the person is incompetent to give informed consent, or if the medication or treatment is necessary to prevent serious physical harm to the person or to others. See [Wis. Stat. § 51.61\(1\)\(g\)](#).

If the court finds an adult incompetent to give informed consent and orders a guardianship of the person, granting the guardian power to consent to medical treatment and medication, [Wis. Stat. § 54.25\(2\)\(d\)2.ab.](#) and [ac.](#) provide that the guardian’s power to consent to psychiatric treatment and medication remains subject to the provisions of [Wis. Stat. ch. 51](#). All individuals, competent or otherwise, have a right not to be given medication or treatment for mental-health conditions without informed consent. [Wis. Stat. § 51.61\(6\)](#); [Wis. Admin. Code §§ DHS 94.03, DHS 94.09](#). For an incompetent person under guardianship, that right is exercised by the guardian. However, in *State ex rel. Roberta S. v. Waukesha County Human Services Department*, [171 Wis. 2d 266](#), 275, [491 N.W.2d 114](#) (Ct. App. 1992), the court held that a guardian, even with a protective service order, lacked authority to physically force a person in an outpatient setting to take medication.

The current guardianship law clarifies that “voluntary” receipt of medication includes receipt of psychotropic medication by a person who does not protest. [Wis. Stat. § 54.25\(2\)\(d\)2.ab.](#) provides that, before giving consent to receipt of psychotropic medication by the ward, the guardian must make a good-faith attempt to discuss voluntary receipt of the medication with the ward. (If the guardian lives at a distance from the ward, it could be important for the court to clarify whether the discussion can occur by telephone or through a surrogate.) The guardian may then give consent only if the ward does not *protest*, which [Wis. Stat. § 54.25\(2\)\(d\)2.ab.](#) defines as making more than one discernible negative response to receipt of the medication. If the person does protest, psychotropic medication may be administered only under a court order for involuntary administration under [Wis. Stat. § 55.14](#) or under a commitment order under [Wis. Stat. ch. 51](#).

Regarding court orders for forcible administration of psychotropic medication, the court can

[o]rder the individual to comply with the treatment plan under [\[Wis. Stat. § 55.14\(8\)\]\(a\)](#). The order shall provide that if the individual fails to comply with provisions of the treatment plan that require the individual to take psychotropic medications, the medications may be administered involuntarily with consent of the guardian. The order shall specify the methods of involuntary administration of psychotropic medication to which the guardian may consent. An order authorizing the forcible restraint of an individual shall specify that a person licensed under [\[Wis. Stat. §\] 441.06, 441.10, 448.05 \(2\), or 448.974](#) shall be present at all times that psychotropic medication is administered in this manner and shall require the person or facility using forcible restraint to maintain records stating the date of each administration, the medication administered, and the method of forcible restraint utilized.

[Wis. Stat.](#) § 55.14(8)(b).

Comment. The holding in *Fond du Lac County v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, [2012 WI 50](#), ¶ 2, [340 Wis. 2d 500](#), [814 N.W.2d 179](#), that commitment under [Wis. Stat.](#) ch. 51 was not available for a person with Alzheimer’s disease, makes it likely that it will be necessary in more cases to use the [Wis. Stat.](#) § 55.14 process for a protective service order for involuntary administration of psychotropic medication, rather than a [Wis. Stat.](#) ch. 51 commitment proceeding.

For more information on a person’s right to refuse medication or treatment before and after a final commitment order, see [chapter 8, infra](#); for information on the protective services proceeding (in which guardians ad litem will play an important role), see [Wis. Stat.](#) § 55.14, and [chapter 7, infra](#).

F. Alternative to Guardianship: Supported Decision-Making Agreements [§ 5.21]

All individuals involved in guardianship proceedings should consider supported decision-making agreements under [Wis. Stat.](#) ch. 52 before proceeding through a full or partial guardianship. Supported decision-making enables people with disabilities to ask for support where and when they need it.

Under [Wis. Stat.](#) § 52.10(1),

If an adult with a functional impairment decides voluntarily, without coercion, to enter into a supported decision-making agreement with a supporter, that adult may, in the agreement, authorize the supporter to do any of the following:

- (a) Provide supported decision-making to the adult with a functional impairment, including assistance in understanding the options, responsibilities, and consequences of that person’s life decisions, without making those decisions on behalf of that person.
- (b) Assist the adult with a functional impairment in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person.
- (c) Assist the adult with a functional impairment in understanding the information described in par. (b).
- (d) Assist the adult with a functional impairment in communicating the adult’s decisions to appropriate persons.

To be clear, “[a] supporter is not a surrogate decision maker for the adult with a functional impairment and does not have the authority to sign legal documents on behalf of the adult with a functional impairment or bind the adult with a functional impairment to a legal agreement.” [Wis. Stat.](#) § 52.10(2).

Per [Wis. Stat.](#) § 52.14(1), a supported decision-making agreement extends until terminated by either party or by the terms of the agreement.

(2) A supported decision-making agreement is terminated if any of the following are true:

- (a) County adult protective services substantiated an allegation of neglect or abuse by the supporter.
- (b) The supporter is found criminally liable for conduct described under par. (a).
- (c) There is a restraining order against the supporter as described under s. 813.123.

(3) An adult with a functional impairment may revoke his or her supported decision-making agreement and invalidate the supported decision-making agreement at any time by doing any of the following:

- (a) Canceling, defacing, obliterating, burning, tearing, or otherwise destroying the supported decision-making agreement or directing another in the presence of the adult with a functional impairment to so destroy the supported decision-making agreement.

- (b) Executing a statement, in writing, that is signed and dated by the adult with a functional impairment, expressing his or her intent to revoke the supported decision-making agreement.
- (c) Verbally expressing the intent of the adult with a functional impairment to revoke the supported decision-making agreement, in the presence of 2 witnesses.
- (4) Unless the supported decision-making agreement provides a different method for the supporter's resignation, a supporter may resign by giving notice to the adult with a functional impairment.

[Wis. Stat.](#) § 52.14(2)–(4).

A supported decision-making agreement does not provide unfettered access to the individual's private information to the supporter. With a signed release, however, the supporter may obtain such information. [Wis. Stat.](#) § 52.16.

An agreement must be signed by two witnesses or a notary public. [Wis. Stat.](#) § 52.18.

Practice Tip. [Wis. Stat.](#) § 52.20 provides a form for a supported decision-making agreement. Although the law does not mandate use of the statutory form, it does require that such agreements are in “substantially” the same form, so unless there is a very good reason to alter the form, attorneys are wise to use the statutory form.

V.

Protective Services and Placement [§ 5.22]

A. Overview [§ 5.23]

Protective services and placement are governed by [Wis. Stat.](#) ch. 55. *See generally infra* [ch. 7](#). The line between orders for placement and orders for services is not a clear one. Protective placement can be ordered to community and home settings, [Wis. Stat.](#) § 55.12(2), and nothing in the statutes precludes an order for protective services for a person under protective placement. To ensure a person's right to appropriate services in the least restrictive conditions, the court might need to view a placement not in terms of an existing facility in which all the person's needs can be met, but in terms of a combination of the least restrictive physical setting in which the person can live and the support, treatment, and educational services needed to help the person live and function in that setting. *See Fond du Lac Cnty. v. J.G.S. (In re J.G.S.)*, [159 Wis. 2d 685](#), [465 N.W.2d 227](#) (Ct. App. 1990).

B. Purpose of Protective Services and Placement [§ 5.24]

[Wis. Stat.](#) § 55.001 contains the legislature's declaration of intent in creating a protective service system. Most of the reported cases interpreting [Wis. Stat.](#) ch. 55 have cited and followed the declaration in [Wis. Stat.](#) § 55.001, as have courts in guardianship cases. *See* cases cited in section [5.14](#), *supra*. Under [Wis. Stat.](#) § 55.001, the declared policy of the state is to do the following:

1. Protect individuals in need of protective services or protective placement from financial exploitation, abuse, neglect, and self-neglect under programs, services, and resources the county can reasonably provide with state and federal funds and county funds required to be appropriated to match state funds;

Note. The systems for reporting, investigating, and responding to reports of abuse, neglect and exploitation of adults-at-risk are discussed at length in Froemming, *Adult Protective Services and Adults-at-Risk*, *supra* § [5.16](#).

2. Within the limits of available state and federal funds and of county funds required to be appropriated to match state funds, ensure the availability of protective services or protective placements to all persons in need of them;
3. Allow people in need of protective placement or protective services the same rights as other citizens; and
4. Place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process, and protection from abuse, financial exploitation, neglect, and self-neglect.

[Wis. Stat.](#) § 55.001 attempts to balance protection with the need to respect the individual's right to self-determination. However, it will not always be possible to fully protect both interests, and it might not be possible to prevent a competent choice of even self-destructive behavior, unless commitment under [Wis. Stat.](#) ch. 51 is appropriate. See *Zander v. County of Eau Claire (In re Guardianship & Protective Placement of Shaw)*, [87 Wis. 2d 503](#), 518 n.3, [275 N.W.2d 143](#) (Ct. App. 1979) (rejecting “the view that where the ‘self-destructive behavior’ consists of drinking, it is evidence *per se* of incompetency”).

C. Patients' Rights [§ 5.25]

[Wis. Stat.](#) § 51.61 and [Wis. Admin. Code](#) ch. DHS 94 set forth the rights of any person who is receiving services under [Wis. Stat.](#) ch. 55, whether on a voluntary or involuntary basis, [Wis. Stat.](#) § 55.23(1); any person who is receiving services from a county department of community programs (DCP) under [Wis. Stat.](#) § 51.42 or 51.437; or any person who is receiving services for mental disabilities or substance abuse from a private treatment agency or facility.

Among the rights protected under [Wis. Stat.](#) § 51.61 are (1) the right to adequate and appropriate treatment and services; (2) the right to least restrictive conditions; (3) the right not to be treated without informed consent; (4) the right to communicate with other people; and (5) the right to humane conditions. [Wis. Stat.](#) § 51.61(1). The rights to adequate services and least restrictive conditions could be conditional on funding. See *infra* § [5.28](#).

In a case that combined a review of a protective placement with an action under [Wis. Stat.](#) § 51.61(7), the court of appeals held that counties have primary responsibility to protect a person's rights to least restrictive conditions and appropriate services under [Wis. Stat.](#) § 51.61(1)(e) and (f):

Considering the statutory scheme as a whole, we conclude that Brown County was the entity primarily responsible for the determination of J.S.'s place of confinement, and thus the proper entity for the guardians to proceed against to complain of the inadequacy of the facilities, programs and treatment at the institution in which the county had placed him. It is up to the placing agency, here the county, to provide the least restrictive residential placement to which J.S. is entitled under sec. 51.61(1)(e), Stats.

J.S. v. State (In re Protective Placement of J.S.), [144 Wis. 2d 670](#), 678, [425 N.W.2d 15](#) (Ct. App. 1988).

D. Right to Services in the Least Restrictive Environment [§ 5.26]

One determination a guardian ad litem is frequently called on to make is whether a particular placement, treatment, support service, or rights restriction is the “least restrictive” consistent with the needs of the person and the purpose of the legal or human service intervention in the person's life. See [Wis. Stat.](#) §§ 51.61(1)(e), 55.12(3).

The “least restrictive environment” is a social concept. As a result of technological advances, improvements in the capability of community services, or changes in social attitudes, what is considered to be the least restrictive environment may change even though the person's medical or physical condition has not changed: “[T]he mere fact that an individual has failed to respond to treatment in the past does not necessarily indicate untreatability or permanence with no hope for a positive effect of new medical and social attitudes and developments.” *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, [122 Wis. 2d 65](#), 82–83, [362 N.W.2d 104](#) (1985). [122 Wis. 2d 65](#), 82–83, [362 N.W.2d 104](#) (1985).

Least restrictive is not defined in [Wis. Stat.](#) ch. 55, but *least restrictive treatment* is defined in [Wis. Admin. Code](#) § DHS 94.02(27), which implements [Wis. Stat.](#) § 51.61, which in turn governs rights of people subject to protective services or placement. See *supra* § [5.25](#). The administrative code defines least restrictive treatment as “treatment and services which will best meet the patient's treatment and security needs and which least limit the patient's freedom of choice and mobility.” [Wis. Admin. Code](#) § DHS 94.02(27). The term “least restrictive” is defined in [Wis. Stat.](#) ch. 54 for purposes of guardianship to mean

that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect.

[Wis. Stat.](#) § 54.01(18).

This meaning is consistent with the factors identified in the statutes, administrative rules, and court cases that have interpreted the term under [Wis. Stat.](#) ch. 55 in evaluating whether a particular placement or approach is the least restrictive:

1. Placement and services must place the least possible restriction on personal liberty and constitutional rights. [Wis. Stat.](#) § 55.001. This factor relates to freedom of movement and other rights, such as freedom of association, freedom of religion, privacy rights, rights to hold property, and the right to vote.
2. Placement and services must, to the maximum degree of feasibility, allow the individual the same rights as other citizens. *Id.* If a person who is the subject of protective placement or services is treated differently from other citizens, a guardian ad litem should ask whether there is some compelling and unavoidable need for the difference.
3. Placement and services must be those that limit the person's freedom of choice the least. [Wis. Admin. Code](#) §§ DHS 94.02(27), DHS 94.07. This factor relates to the range of choices available and to the person's role in making those choices. Development of effective means of communication and choice are closely related: a person can exercise a much broader range of choice if that person has an effective way to communicate and is more likely to communicate if the person has meaningful choices.
4. Placement and services must be those that limit the person's mobility the least. [Wis. Admin. Code](#) §§ DHS 94.02(27), DHS 94.07. This factor relates not only to the use of physical restraints and locks, but also to programmatic restrictions on mobility, such as policies that limit freedom of movement and availability of opportunities and supports to be active in community settings.
5. Placement and services must, to the maximum degree of feasibility, integrate the person into the community. *D.E.R. v. La Crosse Cnty. (In re Protective Placement of D.E.R.)*, [155 Wis. 2d 240](#), 254, [455 N.W.2d 239](#) (1990). Accordingly, use of residential, recreational, work, or program settings that separate the person from the community must be justified by inability to provide needed support services in integrated settings. (This is also a principle of the Americans with Disabilities Act (ADA). *See* [42 U.S.C.](#) §§ 12101–12134; *see infra* § [5.31](#).)
6. Placement and services must minimize adverse social consequences that could result from involuntary placement or services. *Watts*, 122 Wis. 2d at 80. This could include the stigma that is associated with certain placement or proceedings and should also take into account the discontinuity in personal relationships caused by removal from family and community.
7. Under the legislative policy that governs [Wis. Stat.](#) ch. 51 (including the right to least restrictive conditions in [Wis. Stat.](#) § 51.61(1)(e)), no person who can be adequately treated outside a hospital, institution, or other inpatient facility may be involuntarily treated in such a facility. *See* [Wis. Stat.](#) § 55.001.

Too often, unnecessarily restrictive placement is ordered because the person needs services that happen to be available in an existing setting. To justify a placement as least restrictive, however, it should also be proven that the restrictive environment is somehow *necessary* to the delivery of the services and that they cannot be delivered to the person in a less restrictive placement.

The court in *Fond du Lac County v. J.G.S. (In re J.G.S.)*, [159 Wis. 2d 685](#), [465 N.W.2d 227](#) (Ct. App. 1990), held that the array of environments to be considered in determining least restrictiveness is not limited to existing facilities. A placement must be considered if it can feasibly be developed, and the responsible county agency can be ordered to do the necessary planning and implementation. The court also recognized as an accepted practice placement to a typical home or apartment with services designed around individual support needs. *Id.* at 693 (citing S. Taylor et al., *The Nonrestrictive Environment: On Community Integration for People with the Most Severe Disabilities* 12–13 (1987)). *But see infra* § [5.28](#) (explaining that county's obligation may be limited by available funding).

E. Right to Adequate and Appropriate Treatment and Services [§ 5.27]

A basic requirement under [Wis. Stat.](#) § 55.12(3) is that a placement and protective services must be consistent with the person's needs. A person who is protectively placed has an enforceable right to adequate treatment, rehabilitation, and educational services appropriate to the person's condition. [Wis. Stat.](#) § 51.61(1)(f); *see also* [Wis. Admin. Code](#) § DHS 94.08. Protective placement is not a license to fail to develop or maintain the person's potential for independence and productivity. By including the word “educational” in the provisions of [Wis. Stat.](#) § 51.61(1)(f) governing adequate and appropriate services, the legislature made it clear that services must meet developmental needs as well as restorative or maintenance needs. These rights may be subject to limitations based on funding. *See* [Wis. Stat.](#) § 55.12(3) (stating that placement and services must be consistent “with the resources of the county department”); *see infra* § [5.30](#).

F. Responsibility of the County to Provide Services That Are Least Restrictive and Consistent with Individual Needs [§ 5.28]

When ordering protective placement or protective services, the court orders the responsible county agency to provide the protective placement or services. [Wis. Stat.](#) § 55.12(1). The county agency has the primary responsibility for determining the nature of the placement and services and for providing them in the least restrictive manner consistent with the person's needs and its resources. [Wis. Stat.](#) § 55.12(1), (3); *J.S. v. State (In re Protective Placement of J.S.)*, [144 Wis. 2d 670](#), 678, [425 N.W.2d 15](#) (Ct. App. 1988). For a discussion of potential limits on the county's discretion, see the analysis *infra* of *Dunn County v. Judy K. (In re Guardianship of Judy K.)*, [2002 WI 87](#), [254 Wis. 2d 383](#), [647 N.W.2d 799](#), [2002 WI 87](#), [254 Wis. 2d 383](#), [647 N.W.2d 799](#), [2002 WI 87](#), [254 Wis. 2d 383](#), [647 N.W.2d 799](#).

A person's lack of objection to a residential placement and a guardian's ability to consent legally to the placement are not grounds for termination of an ongoing protective placement if the person continues to meet the requirements of [Wis. Stat.](#) § 55.08(1) as a person who qualifies for protective placement. *Jackson Cnty. Dep't of Health & Hum. Servs. v. Susan H. (In re Protective Placement of Susan H.)*, [2010 WI App 82](#), [326 Wis. 2d 246](#), [785 N.W.2d 677](#); see *infra* [ch. 7](#).

Comment. One effect of *Susan H.* is that a county cannot avoid its obligation to continue to provide a protective placement just because the person in residential care and custody does not object to the placement. The holding should also apply to an initial petition for protective placement if the person does not object to the placement.

Under [Wis. Stat.](#) § 55.12(3), the county agency must provide placement or services in the least restrictive environment consistent with (1) the needs of the person to be placed, and (2) the resources of the responsible county agency. [Wis. Stat.](#) § 55.12(4) requires the county to consider the following factors:

1. The needs of the person to be protected for health, social, or rehabilitative services;
2. The level of supervision needed;
3. The limits of available state and federal funds and county funds required to be appropriated to match state funds;
4. The reasonableness of the placement or services, given the number or projected number of individuals who will need protected placements or services and given the limited funds available; and
5. The reasonableness of the placement or services, given the cost and the actual benefits in the level of functioning to be realized by the individual.

While these factors appear to create a balancing test in which reasonableness of cost and funding availability are factors, [Wis. Stat.](#) § 55.12(5) contains what appears to be a flat limit on judicial power: "the county may not be required to provide funding" for a protective placement or protective services beyond available state and federal funds and required county matching funds. It is important to note that this test is based not on reasonableness of cost but on source of funds: if applied literally, a more appropriate and less expensive placement could be denied under this test if required county funds (beyond required matching funds) would be required to implement it.

The protections from court orders that may require county funding in [Wis. Stat.](#) § 55.12(5) do not apply to the county's obligation under [Wis. Stat.](#) § 49.45(30m) to fund its share of the cost of services for people with developmental disabilities who are protectively placed in intermediate care facilities for persons with an intellectual disability (ICF/IDs). In addition, [Wis. Stat.](#) ch. 55 has special provisions regarding the county obligation to develop and implement community service plans for people with developmental disabilities who might otherwise be served in ICF/IDs or nursing homes. See *infra* [§ 5.29](#).

[Wis. Stat.](#) § 55.045, in defining the county's funding obligation for protective services and placements, provides that the responsible agency must provide for reasonable program needs within the limits of state, federal, and required county matching funds. Again, as in [Wis. Stat.](#) § 55.12(5), there is an exception for the funding requirement of [Wis. Stat.](#) § 49.45(30m). Less rigid language on county funding responsibility is included in the legislative purpose statement in [Wis. Stat.](#) § 55.001, see *supra* [§ 5.24](#), and in the

guarantee of rights to least restrictive conditions and adequate and appropriate services under [Wis. Stat.](#) § 51.61(1)(e) and (f). These latter provisions limit county responsibility to what the county board is “reasonably able to provide” with available federal, state, and required county matching funds.

The funding obligations [Wis. Stat.](#) ch. 55 places on the county do not mean that the court lacks authority to set limits on county discretion to ensure that placement and service standards are met. In *Dunn County v. Judy K. (In re Guardianship of Judy K.)*, [2002 WI 87, 254 Wis. 2d 383, 647 N.W.2d 799](#), the supreme court made clear that courts can overrule a county’s choice of placement. In that case, the supreme court ordered a county to provide matching funds needed to obtain funding for a community placement through the Community Integration Program for Persons with Developmental Disabilities (CIP-Ib). The county argued that [Wis. Stat.](#) § 55.06(9)(a) (1999–2000), the predecessor statute to the current [Wis. Stat.](#) § 55.12(4) and (5), left a court with no authority to order a placement that required county funding other than the county match required to obtain “community aids funding.” See *Judy K.*, [2002 WI 87, ¶ 19 & n.8, 254 Wis. 2d 383](#). The Wisconsin Supreme Court held that the county’s interpretation would leave no room for consideration of the statutory factors, now listed in [Wis. Stat.](#) § 55.12(4), for determining the appropriateness of a protective placement. See *Judy K.*, [2002 WI 87, ¶ 21, 254 Wis. 2d 383](#); see also *id.* ¶ 16 (quoting [Wis. Stat.](#) § 55.06(9)(a) (1999–2000)). The court held that, to rely on lack of funding to deny a placement, a county must first make an affirmative showing of a good-faith, reasonable effort to find an appropriate placement and to secure funding to pay for an appropriate placement. *Id.* ¶ 28.

It is clear from the holding in *Judy K.* that, when a county seeks to deny access to a less restrictive or more appropriate placement based on lack of funds, the burden is on the county to demonstrate its effort to find and fund appropriate placement. Arguably, whenever there is an opportunity to obtain matching funds with county tax levy, the county funds can be considered “required” county matching funds. This would not by itself mean that the county must fund the placement, but it would mean that the balancing test in [Wis. Stat.](#) § 55.12(4) would apply.

No reported case has addressed whether a county could, based on lack of state, federal, and required county matching funds, refuse to provide any placement or services, or provide placement and services under circumstances that fail to provide for the person’s health, safety, and protection from abuse, neglect, self-neglect, and financial exploitation. However, a court order for protective placement or services puts the person under the legal protection of the county and may create a constitutional due-process obligation to provide for the person’s health and safety. See *infra* § [5.30](#).

Potential limits on the ability of a county to deny appropriate placement or services to an individual subject to a court order for protective placement or services, beyond the limitations described in *Judy K.*, are discussed in sections [5.29](#) and [5.30](#), *infra*.

Since July 1, 2018, all Wisconsin counties have been participating in Family Care. See *infra* § [5.54](#); see also Wis. Dep’t of Health Servs., *Family Care*, <https://www.dhs.wisconsin.gov/familycare/index.htm> (last revised Sept. 17, 2024). This completed the shift across the state from provision of long-term support services via county-operated programs like CIP and the Community Options Program (COP) to provision of long-term support services via the Family Care managed-care model, which is operated and funded through private CMOs that are separate from the counties. See *id.*; see also *infra* §§ [5.53–56](#).

Comment. The Family Care model complicates the protective placement process in two ways. First, it means that counties have far less in-house expertise in assessment of needs and development of plans for long-term care. Second, it means that the county is no longer in control of the primary funding source for long-term care. Although Family Care is an entitlement for eligible individuals, this does not mean that CMOs can or will provide adequate funding to appropriately meet individual needs in all cases. These issues are discussed in [chapter 7](#), *infra*.

G. Special Provisions for People with Developmental Disabilities Placed in or at Risk of Placement in Intermediate Care Facilities and Nursing Homes [§ 5.29]

Special requirements under both [Wis. Stat.](#) ch. 55 and [Wis. Stat.](#) ch. 46 apply to admissions and continued placements of people with developmental disabilities to facilities that are certified under federal Medicaid law as ICF/IDs and to other nursing homes. (The state centers for people with developmental disabilities are excluded from the definition of *intermediate facility* for purposes of these provisions. [Wis. Stat.](#) §§ 46.279(1)(b), 55.01(4g).) Special funding provisions provide counties with incentives to serve people in community placements that would be less restrictive and more consistent with each individual’s needs. These provisions apply *only to a person with developmental disabilities*, but this includes a person who has both developmental disabilities and other impairments. The provisions that encourage less restrictive placements for such individuals include the following:

1. A requirement that the county develop a plan for community-based care under any of the following circumstances: (a) whenever the county is considering initial protective placement or transfer to an ICF/ID or nursing home, or receives notice that an application for admission of a person to an ICF/ID has been made, [Wis. Stat.](#) §§ 46.279(4)(b), (c), 55.12(6); (b) after notice of a finding that a person who needs active treatment for a developmental disability and who is placed in a nursing facility could be served in an ICF/ID or in the community, [Wis. Stat.](#) §§ 46.279(4)(a), 49.45(6c)(c)3.; and (c) as part of the annual review of a protective placement of a person with a developmental disability who is placed in an ICF/ID or nursing home, [Wis. Stat.](#) §§ 46.279(4)(d), 55.12(6), 55.18(1)(ar);
2. A prohibition on new admissions to ICF/IDs (other than emergency and temporary placements), and on continuing protective placements in annual reviews, unless a court, after considering the plan for community-based care, finds that the ICF/ID is the most integrated setting appropriate to the needs of the individual, or that the county cannot reasonably provide community-based care with available state and federal funds and required county matching funds, [Wis. Stat.](#) §§ 46.279(2), 55.12(6), 55.18(1)(ar);
3. A prohibition on admissions and protective placements to nursing homes (other than emergency and temporary placements), and on continuing protective placements in annual reviews, of individuals who need active treatment for developmental disability, unless the responsible screening agency finds that the individual's needs could not be fully met in an ICF/ID, or under a plan for community-based care, or that the county cannot reasonably provide community-based care with available state and federal funds and required county matching funds, [Wis. Stat.](#) §§ 46.279(3), 55.12(6), 55.18(1)(ar); and
4. A requirement that the county pay the nonfederal share of the cost of placement of a person with a developmental disability in an ICF/ID or nursing home. [Wis. Stat.](#) § 49.45(30m). This requirement is a specific exception from the general rule that a court may require a county to make a placement only if the placement can be made within the limits of federal, state, and required county matching funds. [Wis. Stat.](#) §§ 55.045, 55.12(5).

The effect of these provisions is that there should be a plan for community-based care prepared before every hearing on permanent protective placement and before every annual review of protective placement when placement or continued placement to a nursing home or ICF/ID is involved, and that any fiscal incentive for the county to place an individual in an ICF/ID or nursing home will be mitigated by the obligation to pay the state share of the cost in the institution. A CMO should receive funding for all relocations.

H. Denial of Least Restrictive Placement or Appropriate Services on Grounds of Lack of Funding: Constitutional Issues [§ 5.30]

The Wisconsin Supreme Court, in *State ex rel. Watts v. Combined Community Services Board*, [122 Wis. 2d 65](#), 77–83, [362 N.W.2d 104](#) (1985), ruled, on equal-protection grounds, that the state cannot provide less protection for people under protective placement orders than it provides to people under commitment orders. The court held that protective placement results in the same “massive curtailment of liberty,” *id.* at 80 (citing *Vitek v. Jones*, [445 U.S. 480](#), 491–92 (1980) (citing *Humphrey v. Cady*, [405 U.S. 504](#), 509 (1972))) (discussing loss of liberty from involuntary commitment), as commitment, arising from loss of freedom, adverse social consequences, and intrusion on personal security. *Id.* at 80–81.

The equal-protection rationale of *Watts* requires that, in making protective placements under [Wis. Stat.](#) § 55.12 (formerly numbered as [Wis. Stat.](#) § 55.06(9)(a)), courts have authority equivalent to courts in mental commitment cases to protect individuals' rights to the least restrictive and most appropriate placement. [Wis. Stat.](#) § 51.20(13)(c)2. and (f), and [Wis. Stat.](#) § 51.22(5), provisions in the commitment statutes, mandate placement to the least restrictive environment consistent with the individual's treatment needs, without reference to source of funding. [Wis. Stat.](#) § 51.20(13)(c)1. and 2. give the court authority (1) to designate the facility or service that is to receive the person into the mental-health system and (2) to designate the “maximum level of inpatient facility,” if any, that may be used for treatment. To the extent that [Wis. Stat.](#) § 55.12(5) makes the court's authority to review a county placement decision contingent on source of funds, the statute establishes distinctions between commitment and protective placement similar to those found to have no rational basis in *Watts*.

In *Watts*, the court observed that, while [Wis. Stat.](#) ch. 51 provided a procedure for judicial review of continued commitments, [Wis. Stat.](#) ch. 55 then lacked such a procedure for protective placements. The *Watts* court fashioned a remedy in light of due-process considerations. Based in part on the court's finding that counties had a significant financial conflict of interest in making placement decisions, the court held that county review of placements under [Wis. Stat.](#) ch. 55 was an inadequate safeguard and that a judicial

review was required to satisfy due process. *Id.* at 77–78. For the currently applicable procedures for an annual review under [Wis. Stat. ch. 55](#), see [Wis. Stat. § 55.18](#). See also *infra* [ch. 7](#). The restriction on judicial power in [Wis. Stat. § 55.12\(5\)](#) arguably eliminates independent judicial review in the cases to which it applies.

The court in *Watts* also recognized that commitment and protective placement must be justified by legitimate state interests. *Watts*, 122 Wis. 2d at 80 (citing *O'Connor v. Donaldson*, [422 U.S. 563](#) (1975)). Further, the nature and duration of a confinement must bear a reasonable relation to the purpose of the commitment. *Jackson v. Indiana*, [406 U.S. 715](#), 738 (1972). Wisconsin has based both commitment and protective placement on the principle that the person be provided adequate services and least restrictive conditions. It follows that the state must provide these services and conditions as a matter of due process. See *Youngberg v. Romeo*, [457 U.S. 307](#), 325–26 (1982) (Blackmun, J., concurring).

The Wisconsin Supreme Court affirmed that “the State has more than a well-established and legitimate interest; it has a ‘compelling’ interest in providing care and assistance to those who suffer from a mental disorder.” *Winnebago Cnty. v. Christopher S. (In re Mental Commitment of Christopher S.)*, [2016 WI 1](#), ¶ 44, [366 Wis. 2d 1](#), [878 N.W.2d 109](#) (citing *State v. Post*, [197 Wis. 2d 279](#), 303, [541 N.W.2d 115](#) (1995)). The supreme court determined that [Wis. Stat. § 51.20\(1\)\(ar\)](#) (governing the involuntary commitment of inmates in the Wisconsin state prison system) is facially constitutional because it “is reasonably related to [this] legitimate state interest.” *Id.* ¶ 43. After his incarceration ended, Christopher S. continued to challenge the involuntary medication order, but in an unpublished decision, the court of appeals upheld the circuit court’s dismissal of his challenge as moot because he was no longer incarcerated. *Winnebago Cnty. v. Christopher S. (In re Mental Commitment of Christopher S.)*, No. [2016AP1955](#), 2017 WI 3525411 (Wis. Ct. App. Aug. 16, 2017) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

The Wisconsin Supreme Court has since reexamined and clarified its 2016 decision in *Christopher S.*, in which it held that an expired initial commitment order is moot. [2016 WI 1](#), ¶ 30, [366 Wis. 2d 1](#). The court did not, however, address the effect of collateral consequences on an otherwise moot commitment. In a case decided in 2019, the court observed that collateral consequences may include a firearms ban, civil claims, and costs of care. *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, [2019 WI 54](#), ¶ 28 n.11, [386 Wis. 2d 672](#), [927 N.W.2d 509](#); see also *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, [2020 WI 8](#), ¶ 22, [390 Wis. 2d 50](#), [937 N.W.2d 901](#).

In *D.K.*, [2020 WI 8](#), ¶ 25, [390 Wis. 2d 50](#), the court determined that a firearms ban, which resulted from D.K.’s commitment, was a collateral order subject to attack. The court concluded that “the plain language of [Wis. Stat. § 51.20\(1\)\(a\)2.b.](#) requires a showing that it is much more likely than not that the individual will cause physical harm to other individuals.” *Id.* ¶ 42. This conclusion can be supported by evidence that at least one person was placed in “‘reasonable fear of violent behavior and serious physical harm’ to that same person or another.” *Id.* (quoting [Wis. Stat. § 51.20\(1\)\(a\)2.b.](#)). “This reasonable fear must be ‘evidenced by’ a ‘recent overt act,’ an ‘attempt,’ or a ‘threat to do serious physical harm.’” *Id.* ¶ 42 (quoting [Wis. Stat. § 51.20\(1\)\(a\)2.b.](#)). The court concluded that, based on D.K.’s commitment, there was clear and convincing evidence that D.K. was dangerous, and it was reasonable to subject D.K. to a firearms ban. *Id.* ¶ 56.

In *Winnebago County v. C.S. (In re Mental Commitment of C.S.)*, [2020 WI 33](#), ¶ 5, [391 Wis. 2d 35](#), [940 N.W.2d 875](#), the Wisconsin Supreme Court established:

[Wis. Stat. § 51.61\(1\)\(g\)3.](#) is facially unconstitutional for any inmate who is involuntarily committed under [Wis. Stat. § 51.20\(1\)\(ar\)](#), which does not require a determination of dangerousness, when the inmate is involuntarily medicated based merely on a determination that the inmate is incompetent to refuse medication. Incompetence to refuse medication alone is not an essential or overriding State interest and cannot justify involuntary medication.

In a later unpublished opinion, the Wisconsin Court of Appeals pointed out that *Winnebago County v. C.S.*, [2020 WI 33](#), [391 Wis. 2d 35](#), stands for the proposition that a court may force medication upon an inmate whose commitment and involuntary medication orders were based on [Wis. Stat. §§ 51.20\(1\)\(ar\)](#) and [51.61\(1\)\(g\)3.](#), which do not require a determination of dangerousness. *Waukesha Cnty. v. E.A.B. (In re Mental Commitment of E.A.B.)*, No. [2021AP986-FT](#), 2021 WL 4073650, ¶ 23 n.5 (Wis. Ct. App. Sept. 8, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (citing *C.S.*, 2000 WI 33, ¶¶ 1–2, 5, 34, [391 Wis. 2d 35](#)). However, when a case does not involve an inmate, the county must prove that the individual is dangerous for a recommitment order. See *id.* (citing [Wis. Stat. § 51.20\(1\)\(a\)2.](#), (am); *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, [2020 WI 41](#), ¶¶ 31–34, [391 Wis. 2d 231](#), [942 N.W.2d 277](#)).

A later Wisconsin Supreme Court opinion held “that at least two [collateral] consequences render an appeal of an expired recommitment order not moot: (1) the restriction of one’s constitutional right to bear arms; and (2) the liability for the cost of one’s care.” *Sauk Cnty. v. S.A.M. (In re Mental Commitment of S.A.M.)*, [2022 WI 46](#), ¶ 3, [402 Wis. 2d 379](#), [975 N.W.2d 162](#).

The principles of a right to treatment and of the least restrictive alternative have their roots in constitutional challenges to institutional placements and conditions. See *Wyatt v. Stickney*, [344 F. Supp. 387](#) (M.D. Ala. 1972), *aff’d in part, remanded in part, reserved in part sub nom. Wyatt v. Aderholt*, [503 F.2d 1305](#) (5th Cir. 1974); *Lessard v. Schmidt*, [349 F. Supp. 1078](#) (E.D. Wis. 1972), *vacated*, [414 U.S. 473](#) (1974), *on remand*, [413 F. Supp. 1318](#) (E.D. Wis. 1976) (reinstating earlier judgment). While these issues have not been squarely faced by the U.S. Supreme Court, the Court, in *Youngberg v. Romeo*, [457 U.S. 307](#) (1982) held that intellectually disabled residents of state institutions have constitutional due-process rights to reasonably safe conditions of confinement, freedom from unreasonable restraint, and minimally adequate training. *Id.* at 319. The right to training was limited to training needed to protect the person’s interests in safety and in freedom from unreasonable restraint. *Id.* The Court left the door open to other rights to training if these were connected to liberty interests. *Id.*; see also *Lelsz v. Kavanagh*, [673 F. Supp. 828](#) (N.D. Tex. 1987) (concluding that defendants violated institutionalized persons’ rights to safety, freedom from restraint, and training); *Association for Retarded Citizens of N. Dakota v. Olson*, [561 F. Supp. 473](#), 486–87 (D.N.D. 1982) (construing right to training to include training to prevent regression and to help person be mobile and communicate), *aff’d*, [713 F.2d 1384](#) (8th Cir. 1983). The Court also held that the constitutional test of a service decision was limited to whether the decision was based on a genuine “professional judgment.” *Youngberg*, 457 U.S. at 321. The Court explained that the term *professional* in the context of “[l]ong-term treatment decisions,” for example, referred to “persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded.” *Id.* at 323 n.30. Clearly, in light of this definition, a decision based solely on source of funding is not based on a genuine professional judgment.

The Wisconsin Supreme Court acknowledged that *Lessard v. Schmidt*, [349 F. Supp. 1078](#) (E.D. Wis. 1972), *vacated*, [414 U.S. 473](#) (1974), *on remand*, [379 F. Supp. 1376](#) (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *on remand*, [413 F. Supp. 1318](#) (E.D. Wis. 1976) (reinstating earlier order), “established substantive and procedural rights for those undergoing commitment procedures,” including both oral and written “notice of various rights, a probable cause hearing within a limited period of time with appointed counsel, written notice of the final hearing, and a full hearing within 14 days of the original detention.” *Outagamie Cnty. v. Michael H. (In re Mental Commitment of Michael H.)*, 2014 WI 127, ¶ 25, [359 Wis. 2d 272](#), [856 N.W.2d 603](#). The supreme court further stated, “*Lessard*’s requirements have generally stood the test of time, although the burden of proof it imposed was lowered ... to the ‘clear and convincing evidence’ standard.” *Id.* ¶ 27 (quoting *Addington v. Texas*, [441 U.S. 418](#), 419–20 (1979)).

At a minimum, *Youngberg* provides a basis for saying that a county cannot, on the basis of funding source, deny placement and services to a person under a protective placement or protective service order, when those services are necessary to ensure safety or freedom from unreasonable restraint or to provide minimally adequate training. A state does not generally have a constitutional obligation to protect the safety of its citizens, but it may have an obligation to protect arising from a “special relationship,” such as when the state imposes a restraint on an individual’s liberty. See *DeShaney v. Winnebago Cnty. Dep’t of Social Servs.*, [489 U.S. 189](#), 199–200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”). A court order for protective placement or services arguably creates that kind of special relationship.

The Wisconsin Court of Appeals affirmed “that the government is not under a constitutional duty to affirmatively protect persons or to rescue them from perils ‘that the government did not create.’” *Disability Rights Wis. v. University of Wis. Hosp. & Clinics*, No. [2014AP135](#), 2014 WL 6977869, ¶ 33 (Wis. Ct. App. Dec. 11, 2014) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (quoting *DeShaney*, 489 U.S. at 195).

Note. In *Fond du Lac County v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, [2012 WI 50](#), ¶ 22, [340 Wis. 2d 500](#), [814 N.W.2d 179](#), the Wisconsin Supreme Court quoted *Youngberg*, 457 U.S. at 321, as a constitutional case that emphasized “the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints.”

Some courts have found that *Youngberg* provides a basis for an order for community placement and services when there is professional agreement that more restrictive placement and services are inappropriate and that the decision to deny alternative services was made for financial or administrative reasons. See, e.g., *Clark v. Cohen*, [794 F.2d 79](#), 87 (3d Cir. 1986); *Thomas S. v. Morrow*, [781 F.2d 367](#) (4th Cir. 1986). Other courts have read *Youngberg* to create no right to community placement. See, e.g., *Lelsz v.*

Kavanagh, [807 F.2d 1243](#) (5th Cir. 1987); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, [737 F.2d 1239](#), 1247–49 (2d Cir. 1984); *Phillips v. Thompson*, [715 F.2d 365](#) (7th Cir. 1983).

I. Americans with Disabilities Act (ADA) [§ 5.31]

Title II of the ADA, 42 [U.S.C.](#) §§ 12131–12134, prohibiting discrimination on the basis of disability by state and local governments, provides another potential basis for a right to integrated services. In the ADA, Congress has made a series of findings concerning the past and present situation of people with disabilities, including a finding that segregation is itself a form of discrimination, and a finding that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency.” 42 [U.S.C.](#) § 12101(a)(7).

In at least one Wisconsin protective placement case, *Dunn County v. Judy K. (In re Guardianship of Judy K.)*, [2002 WI 87](#), ¶ 41 n.11, [254 Wis. 2d 383](#), a party raised an issue of the application of the ADA to a county denial of community placement. While the court in *Judy K.* did not base its decision on the ADA, the ADA may have helped persuade the court to interpret [Wis. Stat.](#) ch. 55 to require reasonable efforts to find and fund community placement. For further discussion of *Judy K.*, see section [5.28](#), *supra*.

The U.S. Supreme Court directly addressed the applicability of the ADA to placement decisions in *Olmstead v. L.C.*, [527 U.S. 581](#) (1999), *aff’g* [138 F.3d 893](#) (11th Cir. 1998). In that case, two individuals argued that their confinement in a state institution violated the ADA when the state’s own treatment professionals had stated that they could be appropriately served in a community-based program. The Court held that in the ADA, “Congress explicitly identified unjustified ‘segregation’ of persons with disabilities as a ‘form of discrimination.’” *Id.* at 600. The Court went on to hold that it is discrimination under the ADA for the state to require that a person live in an institution in order to receive needed services if the person is a *qualified individual* for purposes of receiving services in a community-based program. A qualified individual is a person with a disability who, “with or without reasonable modifications to rules, policies, or practices, ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 [U.S.C.](#) § 12131(2). The *Olmstead* Court stated that, despite its finding that discrimination had occurred in that case, “the [s]tate generally may rely on the reasonable assessments of its own professionals in determining whether an individual ‘meets the essential eligibility requirements’ for habilitation in a community-based program.” *Olmstead*, 527 U.S. at 602.

Rules implementing the ADA require that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 [C.F.R.](#) § 35.130(b)(7)(i).

Olmstead did not provide a clear answer to the question of the extent to which cost can justify institutionalization. The plurality opinion stated that it is not enough to simply compare the cost of community care for the particular individuals to the cost of institutional care, or to compare increased cost to the overall state mental-health budget. The plurality opinion would require courts to consider the state’s interest in maintaining a range of service settings, and the difficulty in transferring resources immediately from one service form to another:

If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.

Olmstead, 527 U.S. at 605–06.

In *Bruggeman v. Blagojevich*, [324 F.3d 906](#), 911–13 (7th Cir. 2003), the Seventh Circuit held that the 11th Amendment does not bar a lawsuit for prospective injunctive relief under the ADA against state officials sued in their official capacity.

In *Radaszewski v. Maram*, [383 F.3d 599](#) (7th Cir. 2004), the court reversed an order for judgment on the pleadings in a challenge to the state’s refusal to fund in-home nursing care, holding the following:

Nothing in the regulations promulgated under the ADA or the Rehabilitation Act or in the Court’s decision in *Olmstead* conditions the viability of a Title II or section 504 claim on proof that the services a plaintiff wishes to receive in a community-integrated setting already exist in exactly the same form in the institutional setting. Although a State is not obliged to create entirely new services or to otherwise alter the

substance of the care that it provides to Medicaid recipients in order to accommodate an individual's desire to be cared for at home, the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings.

Id. at 611.

In *Disability Advocates, Inc. v. Paterson*, [598 F. Supp. 2d 289](#) (E.D.N.Y. 2009), the court held that housing adults with mental illness in adult residential care facilities could constitute a violation of the integration mandate of the ADA. The court held that the proper inquiry was not whether residents had some contact with other members of the community, but whether residents were in the “most integrated setting appropriate to [their] needs,” 28 [C.F.R.](#) § 35.130(d), defined as a setting that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible,” 28 [C.F.R.](#) pt. 35 app. B. See *Disability Advocates*, 598 F. Supp. 2d at 311–13, 319–22; see also *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2010 WL 786657 (E.D.N.Y. Mar. 1, 2010). The Second Circuit Court of Appeals vacated the district court's 2010 decision and dismissed the entire action on the ground that Disability Advocates lacked standing to bring the lawsuit. *Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, [675 F.3d 149](#) (2d Cir. 2012).

After the Second Circuit dismissed *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, [675 F.3d 149](#) (2d Cir. 2012), the case was refiled as *O'Toole v. Cuomo*, No. CV-13-4166 (E.D.N.Y.), with a separate complaint by the U.S. Department of Justice, *United States v. New York*, No. CV-13-4165 (E.D.N.Y.). A stipulation and order of settlement was filed July 23, 2013. Documents relating to the case are available on the website of the Judge David L. Bazelon Center for Mental Health Law, <https://www.bazelon.org/otoole-v-cuomo/> (last visited Sept. 30, 2024). Despite the dismissal and ultimate settlement, the initial *Disability Advocates* case remains valuable as a substantive example of ADA litigation.

Now that Family Care has been implemented statewide, there should not be any waiting lists for community services, but the rates available to the CMO may limit its ability to provide appropriate alternative services. See *infra* § [5.54](#), [ch. 7](#).

J. Injunctions, Restraining Orders, and Criminal Prosecution as Protective Measures [§ 5.32]

Since guardians ad litem could encounter situations in which a ward or proposed ward might be in a vulnerable situation requiring additional legal protection, all guardians ad litem should be aware that Wisconsin has a variety of statutory tools to protect vulnerable adults from abuse as follows:

1. *Criminal penalties for abuse of individuals at risk.* Any person who intentionally or recklessly subjects an individual at risk to maltreatment is subject to criminal penalties. [Wis. Stat.](#) § 940.285. An *individual at risk* is either an elder adult at risk, see [Wis. Stat.](#) § 46.90(1)(br), or an adult with physical or mental disabilities, see [Wis. Stat.](#) § 55.01(1e). Any charges under [Wis. Stat.](#) § 940.285 are on top of other crimes that may be charged, such as battery, reckless injury, theft, recklessly endangering safety, criminal damage to property, burglary, forgery, false imprisonment, stalking, intimidation of a victim, or disorderly conduct.
2. *Domestic abuse mandatory arrest law.* A law enforcement officer must arrest an alleged perpetrator of domestic abuse if, under [Wis. Stat.](#) § 968.075(2)(a), “[t]he officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person’s actions constitute the commission of a crime;” and “[a]ny of the following apply:”
 - a The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely.
 - b There is evidence of physical injury to the alleged victim.
 - c The person is the predominant aggressor.
3. *Civil penalties for consumer-protection violations.* Wisconsin law provides for supplemental forfeitures for violation of consumer-protection statutes under certain conditions, when the victim of the violation is elderly or disabled. [Wis. Stat.](#) § 100.264.
4. *Individuals-at-risk restraining orders and injunctions.* Upon the filing of a petition alleging abuse, financial exploitation, neglect, stalking, or harassment of an individual at risk or mistreatment of an animal owned by or in service to an individual at risk, a court may issue a temporary restraining order and, following a hearing (at which an elder adult-at-risk petitioner can participate

by telephone or live audiovisual means), an injunction against the respondent. [Wis. Stat.](#) § 813.123. The court has the discretion to order a permanent injunction if the petitioner requests one. [Wis. Stat.](#) § 813.123(5)(d)1m. As in the criminal penalties mentioned above, individuals at risk include elder adults at risk and adults with physical or mental disabilities. Unlike other Wisconsin restraining orders, any person may file for an individuals-at-risk restraining order on behalf of the individual. If someone other than the individual at risk files the petition, the court must appoint a guardian ad litem to represent the individual-at-risk's best interests. [Wis. Stat.](#) § 813.123(3)(b). Because of its focus on individuals at risk, a restraining order under [Wis. Stat.](#) § 813.123 is an especially useful procedure to assist in situations involving emotional abuse, financial exploitation, and abuse of animals.

5. *Domestic abuse restraining orders and injunctions.* While the individuals-at-risk restraining order and injunction statute discussed above are specific to the elderly and people with disabilities, those individuals may also use the domestic abuse restraining order and injunction statute, when applicable. [Wis. Stat.](#) § 813.12. A guardian may petition for such a restraining order or injunction on behalf of their ward. A petitioner who is an “elder person” can participate in hearings by telephone or live audiovisual means. [Wis. Stat.](#) § 813.12(5b). The court has the discretion to order a permanent injunction if the petitioner requests one. [Wis. Stat.](#) § 813.12(4)(d)1m. The statute defines *domestic abuse* as specific conduct committed by (1) an adult family member or adult household member against another adult family member or adult household member, (2) an adult caregiver against an adult who is under the caregiver's care, (3) an adult against their adult former spouse, (4) an adult against an adult with whom the individual has or has had a dating relationship, or (5) an adult against an adult with whom the person has a child in common. Conduct constituting domestic abuse includes actual or threatened (1) intentional infliction of physical pain, physical injury, or illness; (2) intentional impairment of physical condition; (3) sexual assault; (4) stalking, or (5) criminal damage to property. [Wis. Stat.](#) § 813.12(1)(am). It is worth noting that under this statute, “caregiver” is included in the list of individuals against whom a petition may be filed, regardless of whether the caregiver lives with the victim.

VI. Collecting and Evaluating Information [§ 5.33]

Note. This part of the chapter relies heavily on input from Mark Sweet, Ph.D., Trainer, Disability Rights Wisconsin, and on Marcie M. Brost and Terri Z. Johnson, *Getting to Know You: One Approach to Service Assessment and Planning for Individuals with Disabilities* (1982).

A. Overview [§ 5.34]

The guardian ad litem's primary role in representing a client who has a mental disability is to make an independent evaluation of the client's best interests and to advocate for those interests before the court. The guardian ad litem must remember, however, that the guardian ad litem represents the client's *best interests*, not the client's wishes. In gathering and considering information for these purposes, the guardian ad litem's role is similar to that of anyone evaluating the client's abilities, disabilities, and support needs. The discussion in sections [5.40–.48](#), *infra*, of a good evaluation's purpose, process, and content applies to the guardian ad litem in the role of evaluator and may be helpful in planning this process. In general, the guardian ad litem will depend on four major methods of obtaining information: (1) interviewing and observing the client, (2) talking to other significant people in the client's life, (3) reviewing service and other records, and (4) reviewing (or requesting) evaluations done specifically for the court process. At the end of this process, the guardian ad litem should have answers to the following questions:

1. What is the client like? What are important things to know about the client's interests, preferences, appearance, and personality?
2. What has the client's life been like? What is the history of the client's involvement with parents and other family members? In what ways and how successfully has the client been involved with the service system?
3. What is the client's life like now? Where and with whom does the client spend time? What goes on in the various places the client spends time?
4. In what specific ways does the person's disability complicate the client's life? What types and levels of support does the client require?
5. What possibilities seem to exist to make life better for this client? What would be the result of making such changes? What are the consequences to the client if the situation remains as it is?

B. Interviewing and Getting to Know the Client [§ 5.35]

Note. If the individual has adversary counsel, the guardian ad litem must respect the individual's right to have adversary counsel present at any interview with the guardian ad litem. *Jennifer M. v. Maurer (In re Guardianship of Jennifer M.)*, [2010 WI App 8](#), 323 Wis. 2d 126, [779 N.W.2d 436](#) (citing [Wis. Stat.](#) ch. 54).

The discussion in [chapter 2](#), *supra*, concerning how to pose questions in a nonthreatening way and how to be a good listener applies to any interview situation and is not repeated here. *See also infra* [ch. 7](#). Rather, the following are suggestions about interviewing people who are alleged to have mental disabilities, who may have other communication impairments, and who may have very limited life experiences.

1. *Prepare carefully for the interview.* The client might have difficulty remembering information or knowing what is relevant. It helps to know something about the client and the client's history and circumstances to help jog the client's memory or to get the client on track. It is also important to be aware of possible communication barriers.
2. *Show respect for the client as an adult.* The client is as worthy of respect and consideration as any other person. The client should be greeted in an ordinary way and addressed as an adult—a mature response will then be more likely. Do not assume that the client cannot understand simply because the client does not speak: the ability to receive messages is often much better than the ability to send them. Try not to talk with staff in front of the client as if the client were not there.
3. *Define the interview's purpose for the person.* Explain the guardian ad litem's purpose in being there, the legal process, and the client's rights. Try to phrase this information in simple language and assume the client can understand at least some part of it. Rushing, mumbling, or shouting will not help the client's understanding. The client has a right to know the guardian ad litem's role before the interview begins, and the explanation may provide a starting point for questions or discussion.
4. *Do not make assumptions from records.* Keep an open mind until all the information is in. Records and evaluations tend to be written to identify problems and may paint a negative or incomplete picture. Do not assume that the records are accurate, and that the client is inaccurate—check out conflicts with other sources.
5. *Use the opportunity for observation.* If there are barriers to communication, the guardian ad litem might learn more by watching the client than by talking. It is useful to schedule visits to observe the client in more than one environment and to see the client in an environment in which the client is actively engaged. For example, it is often possible to time a visit in an institutional setting to observe the client in a work program for 15 minutes and then interview the client in the residential unit; it might also be possible to schedule lunch with the client in another setting. If the client goes to school or work, try to observe or at least interview someone from that setting. This approach gives a sense of the client's different environments and the client's response to them. It also gives the guardian ad litem a chance to see programs and meet staff. Talking about the work or activity can provide a starting point for the interview.
6. *Try to get a sense of the client's preferences.* The guardian ad litem is not required to follow the client's wishes, but the client's wishes are certainly one important factor in determining best interests. A guardianship, placement, or service is more likely to succeed if the client understands why it was chosen and has a commitment to it. The client should feel that the client's views are respected and considered. In some cases, these preferences may have to be deduced from the person's responses to different environments and activities.
7. *Consider bringing someone with knowledge about service needs.* Some guardians ad litem prefer to bring another person, for all or part of the interview, who is knowledgeable about the client's disability and about the service system. This outside person could be a human services professional or a citizen advocate who can bring a knowledge and perspective the guardian ad litem does not have. The outside person should not be someone who has a conflict of interest or whose presence might influence the client's responses. The guardian ad litem should remember that guardians ad litem remain responsible for making their own recommendations.
8. *See the client privately.* In setting up the interview, the guardian ad litem should request some time when the client can be seen privately, apart from caretakers and facility staff. This might not happen unless it is requested. The guardian ad litem might also

want to have caretakers and staff present part of the time to introduce the guardian ad litem, to interpret, or to allow the guardian ad litem to see whether the client responds differently to questions when others are present. However, be aware that the client might be unwilling to speak frankly in the presence of caretakers. Particularly when there is any reason to suspect abuse or neglect, ensure that communications are private and, if possible, hold the interview in a setting apart from the one where the suspected abuse occurred.

9. *Be aware of barriers to getting useful information.* Ability and willingness to communicate are highly individual. The following are common barriers to effective communication:

- a. The client might not be able to communicate by speech, because of a sensory or neurological disability. The guardian ad litem should find out whether the client has an alternative communication device, such as a word-board or symbol-board (it will not always be visible or in use). If the client uses sign language effectively, the guardian ad litem should arrange for an interpreter. A directory of freelance interpreters in Wisconsin is available on the DHS website at <https://www.dhs.wisconsin.gov/odhh/interpreting/interpreter-directory.htm> (last revised Mar. 12, 2021). Coordination of interpreter services is now placed in the Office for the Deaf and Hard of Hearing (ODHH), part of the Bureau of Aging and Disability Resources in the DHS Division of Long Term Care. Contact information for the ODHH is available at <https://www.dhs.wisconsin.gov/odhh/Staff/index.htm> (last revised Aug. 23, 2024). Information on the telecommunications relay service and captioned telephone service is available at Wisconsin Relay, <https://www.wisconsinrelay.com/> (last visited Sept. 30, 2024). Someone who knows the client may be able to better understand the client; it may be necessary to sacrifice privacy for understanding during some parts of the interview.
- b. The client may have a clear idea of what the client wants, but because of a communication disability, may not be able to express it. The client should be made to feel that the guardian ad litem will take the time to try to understand. It may help to describe alternatives and observe the person's responses.
- c. Conversely, the client may speak fluently but have very poor ability to understand alternatives or the consequences of actions and choices. It is a good idea to ask the client what the client thinks a choice involves or why the client is making a particular choice. The client may also respond to questions that the client does not understand. Phrase questions in different ways to see whether responses are consistent.
- d. The client may lack a base of experience on which to make choices. It is likely the client has little understanding of the court process. People in restricted settings may never have lived anywhere else and may not understand what is meant by "group home" or what community living would be like. Acceptance or rejection of these options may have little meaning unless the client is given an opportunity to learn about them through, for example, trial visits or overnight stays.
- e. The client may not trust the guardian ad litem and may see the guardian ad litem (not necessarily inaccurately) as the representative of a system that does not respect the client's preferences. People who are long-term clients of human services can develop strong skills in telling people what they want to hear and in manipulating them. The guardian ad litem should use other sources to find out the facts, rather than assume that what the client says is accurate. On the other hand, never assume the client is being inaccurate without verifying the client's statements.
- f. The client may not be accustomed to forming or being asked for an opinion and thus may be unable to express an accurate preference. Again, ask questions in different ways to check for consistency.

Note. A useful guide to thinking about how much weight to give to an opinion or preference expressed by the person is provided by *Assessment of Older Adults Handbook*, *supra* § 5.17, published by the ABA and the American Psychological Association.

C. Talking to Significant People in the Client's Life [§ 5.36]

People who have had an opportunity to get to know the client well are often excellent sources of information of the type that might not appear in written records or evaluations, including information about the client's preferences, abilities, and responses to different environments. People to interview include the guardian, family, friends, the citizen advocate, residential service staff, vocational service staff, and therapists. The guardian ad litem should try to talk to direct service staff, professionals, and managers because they are likely to have spent the most time with the person. For a client in a restrictive setting or a setting in which there is little active

programming, it is particularly important to identify and interview people who have observed the client in the present or past in more active settings, such as school, work programs, or community activities. For example, a schoolteacher may provide a different picture of the client's ability to learn than that provided by residential staff. Similarly, a citizen advocate who has engaged the client in community activities may have a different picture of the client's behavior.

D. Checking Files and Records [§ 5.37]

Records from different settings are most useful for getting a sense of the client's history, how the client has done in different environments, and what types of opportunities and supports the client has had to develop skills or to function in less restrictive settings. It is advisable to check interview information against records to see, for example, whether prescribed programs are in fact being delivered.

The guardian ad litem's right of access to treatment and service records is governed by [Wis. Stat.](#) §§ 51.30(4)(b)11. and 55.22(1)(b). For exceptions under the confidentiality provisions of the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (HIPAA), see the federal regulations at 45 [C.F.R.](#) § 164.512. (Links to the statute, rules, and policy are available at U.S. Dep't of Health & Hum. Servs., *HIPPA for Professionals*, <https://www.hhs.gov/hipaa/for-professionals/index.html> (last reviewed July 19, 2024).) Because of the lack of reference to [Wis. Stat.](#) ch. 54 and [Wis. Stat.](#) ch. 55 in [Wis. Stat.](#) § 51.30(4)(b)11. and the complexity of federal regulations on this issue, it will often be easier to get access by getting a court order for release of records. See [Wis. Stat.](#) §§ 51.30(4)(b)4., 146.82(2)(a)4. Under [Wis. Stat.](#) § 905.04(4)(am), the privilege for medical and treatment records does not apply to an evaluation for purpose of guardianship.

Some records of value might not be in the files of the residential provider. Evaluations for purposes of assessing service needs for Family Care, *see infra* §§ [5.53–56](#), are likely to be particularly useful. The guardian ad litem should check with the responsible county agency or MCO to see whether a recent evaluation has been done or to request an evaluation. If the client has a mental illness or is intellectually disabled and is a resident in a nursing home, the preadmission screen or annual review under [Wis. Stat.](#) § 49.45(6c) may be useful.

E. Legal Requirements for Evaluations [§ 5.38]

In every guardianship and protective placement case, the court must require an expert evaluation. See [Wis. Stat.](#) §§ 54.36(1), 55.11. Although the court is responsible for making an independent determination on the issue based on all the evidence, professional evaluations will obviously play a key role given that the issues involve mental condition and treatment and service needs.

The guardian ad litem is responsible for informing the client and, in an annual review, the guardian, of the right to independent evaluation, and is also responsible for making an independent recommendation to the court as to whether additional evaluation is needed. [Wis. Stat.](#) §§ 54.40(4)(b), (e), 55.10(4)(b), 55.18(2)(b)3., (3)(b). The guardian ad litem must be able to critically review an evaluation to determine whether the evaluator had the information needed to make accurate conclusions and recommendations, and whether the evaluation provides information that is relevant to determining and protecting the person's best interests.

Note. The statutes give the guardian ad litem considerable scope for ensuring that all relevant issues are adequately addressed. The guardian ad litem may recommend additional medical, psychological, or other evaluations. [Wis. Stat.](#) §§ 54.40(4)(e), 55.10(4)(b), 55.18(2)(f)1.

In protective placement actions, [Wis. Stat.](#) § 55.11(1) requires the court to order a *comprehensive* evaluation that must include at least the following:

- (a) The address of the place where the person is residing and the person or agency who is providing services at present, if any.
- (b) A resume of professional treatment and services provided to the individual by the department or agency, if any, in connection with the problem creating the need for placement.
- (c) A medical, psychological, social, vocational, and educational evaluation and review, if necessary, and any recommendations for or against maintenance of partial legal rights as provided in s. 54.25(2). The evaluation and review shall include recommendations for the individual's placement that are consistent with the requirements of s. 55.12(3), (4), and (5).

These provisions require a comprehensive evaluation that should indicate whether a legitimate effort has been made to exhaust nonrestrictive alternatives. Indeed, the full range of the client's support needs are at issue. A court has authority and responsibility to order further evaluation if a needed element is missing or coverage is inadequate. The court in protective placement and protective services cases is not limited to medical or psychological resources: "The court may utilize available multidisciplinary resources.... The county department or agency with which it contracts under [[Wis. Stat.](#) § 55.02(2)] ... shall cooperate with the court in securing available resources." [Wis. Stat.](#) § 55.11(1).

If the comprehensive evaluation does not address necessary issues, the guardian ad litem can either (1) ask the court to order further evaluation under [Wis. Stat.](#) § 55.11 for the matter to proceed or (2) request an independent evaluation. [Wis. Stat.](#) § 55.10(4)(e) provides that the individual has a right to an independent comprehensive evaluation, which should mean an evaluation covering any of the issues that must be addressed under [Wis. Stat.](#) § 55.11.

Even if the person's needs and conditions have not changed, periodic reevaluation is often important because of possible changes in treatment technology, the capabilities of the service system, or social attitudes. *See State ex rel. Watts v. Combined Cmty. Servs. Bd.*, [122 Wis. 2d 65](#), 83, [362 N.W.2d 104](#) (1985).

F. Critical Review of Evaluations [§ 5.39]

1. Purpose of Evaluation [§ 5.40]

The goals an evaluator seeks to achieve will determine an evaluation's usefulness. For example, if the evaluator focuses only on treatment of the client's disabilities, the recommendations are likely to neglect the client's other human needs and to fail to take advantage of the person's abilities. If the evaluator assumes the client must stay in a particular environment, the client's abilities and needs in other environments will not be evaluated.

In the context of guardianship and protective placement cases, the most useful evaluation is usually the one that attempts to define in functional terms the client's abilities and the support and treatment services the client needs to live as valued a life as possible. *See infra* §§ [5.45–48](#).

2. Evaluators' Expertise [§ 5.41]

Evaluations are often performed by physicians and psychologists who can provide valuable information about the client's physical and mental condition and about formal treatment needs, but who often see people only in clinical settings and know little about how the client functions in ordinary settings or about how to design support services to help the client function better. Given the purpose of the evaluation, it is important also to involve evaluators who have experience arranging and providing treatment and support services in natural settings for people with needs and disabilities similar to the client's. For example, if the question is whether a client can live in a community setting and, if so, what supports and services are needed, a program planner from a provider serving people with similar needs is often the best expert. When requesting an independent evaluation, the guardian ad litem may need to convince the court that what is needed is not a medical or psychological evaluation, but an evaluation by a person with expertise in developing and providing supportive services. The resources listed in [appendix 5B](#), *infra*, can often provide information about evaluators and service providers who have worked with people who have particular kinds of needs.

In most cases, one individual will not have all the needed expertise to do a comprehensive evaluation. In reviewing an evaluation for comprehensiveness, it is important to note not only whether an issue is addressed, but also whether the evaluators had reports from or direct involvement with people having the expertise needed to make the conclusion offered.

3. Sources of Information About the Client [§ 5.42]

An evaluation is no better than the quality of the information on which it is based. Evaluations can be based solely on information the evaluator obtained through tests performed under highly artificial conditions, or purely on written reports that involved no contact with the client, or solely on the client's behavior and characteristics in the current environment. None of these perspectives by itself can provide a complete picture of the client. Rather, the evaluator should do a combination of the following:

1. *Meet and spend time observing and working with the client.* Time should be spent not only in the client's current setting, but in several environments in which the client's behavior and support needs can be directly observed. For example, a client might be quite different in a work setting, where the client has something productive to do, than in a residential setting, where the client is waiting for something to happen. Going to lunch with clients can help evaluators learn how the clients use transportation, get around on city streets, communicate, use their hands, handle money, present themselves and exhibit a public demeanor, and so forth. The more extensive the relationship, the more credible the result is likely to be. Thus, a therapist who has provided weekly counseling to the client over a period of months will be more credible on the issue of the person's ability to make decisions than one who has seen the client only for evaluation purposes.
2. *Interview important people in the client's life.* These include the guardian, family members, friends, residential staff, teachers, vocational support workers, and so forth. People who know the client on a long-term basis will have access to information that short-term contact cannot provide. In addition, the client may show quite different behaviors and abilities in different environments or with different people. Comparing descriptions from several sources can be very valuable.
3. *Review written records.* These include records from past and current evaluators and service providers.
4. *Have access to and consider the client's history.* What kinds of opportunities and experiences has the client had to learn needed skills? What approach has already been tried to meet support needs in less restrictive settings?

4. Common Assumptions That Limit Usefulness of Evaluations [§ 5.43]

Recommendations for placements and programs are frequently based on categorical labels, test scores, or service-generated performance criteria, rather than on how the client learns and uses necessary skills and what supports are needed to help the client have normal experiences for a person of the same age. A perspective that permeates many written evaluations is that usual life experiences associated with home, friends, work, recreation, leisure, and general community activities are not feasible for people with certain types of disabilities. Although the purpose of evaluations should be to determine what instructional and support services might enable an individual to participate in at least those activities usually associated with the individual's chronological age and interests, the opposite is often done. Information is often compiled and used to justify the exclusion of an individual from usual life experiences. Common reasons that the focus of the evaluation content can shift from the client's functional needs to the client's externally imposed limits include the following:

1. *Assumptions based solely on diagnostic labels.* Diagnostic labels can be useful tools for describing people's general characteristics and likely types of supported program needs. However, they do not by themselves indicate what a particular person can or cannot do or what particular supports are needed. They are most dangerous if recommendations are based on negative stereotypes such as the following: people who are profoundly disabled cannot learn or work and no attention need be paid to providing learning or work opportunities for them; people with schizophrenia are automatically dangerous and must be institutionalized; or people with Alzheimer's disease are hopeless cases who cannot benefit from stimulation and activities.
2. *Assumptions based solely on test or assessment scores, such as IQ or "mental age."* A test score can be a useful piece of information, but it is nothing more than a measurement of performance on a particular test on a particular day. Tests have several limitations:
 - a. They might not adequately account for physical, sensory, or communication impairments that prevent the person from expressing ability.
 - b. They could be culturally biased in assumptions about exposure to certain types of experiences or a particular language.
 - c. They assume that the person does not do prescribed tasks because the person is unable to do them. Given that the person is often being asked to perform tasks of no apparent benefit to anyone, in a closed environment, and for someone the person does not know well, it is important to consider the possibility that the person was not motivated to do what was asked. Tests show performance, not necessarily ability.
 - d. They might say as much about what the person has had an opportunity to learn as they do about innate intelligence. A person isolated in a large institution and deprived of stimulation and normal experiences is likely to show developmental delays or regression. These limitations are not apparent when test results are presented as scientific measures of intelligence or social

ability. For example, some tests express the person's performance score in terms of "mental age." This score is often taken to mean that a 30-year-old person who has a mental age of three is really a small child and should be treated as such. If this person has been treated as a 3-year-old for the person's entire life, it is likely that the person will behave and function like one. On the other hand, if throughout life the person has been treated and supported in activities in accordance with the person's actual age, the person will be much more likely to have learned to think of and to present himself as a person of 30, and to be able, with support, to participate in at least the usual activities for a person of that age. The choices are in the service design.

3. *Assumptions based on program entrance and exit criteria: the "readiness" approach.* Entrance and exit criteria can help ensure that programs admit only people they can serve, and that people do not get stuck in a program beyond the point of its usefulness to them. Unfortunately, such criteria have often come to be used to determine that a person who does not meet them is not *ready* for community environments and normal activities and experiences. This *readiness* approach has several dangers:
 - a. Criteria often exclude people who are difficult to serve, resulting in very few community-based options (or no services at all) for people with severe disabilities. For example, vocational service providers often exclude people with challenging behaviors. If all providers in a community do so, the result is total exclusion from opportunities to work.
 - b. Criteria might serve primarily program or system needs, such as having enough people in the program to keep the building going or the beds full.
 - c. The person who has been admitted to a program bears the burden of establishing readiness to leave it. If the person's disabilities prevent the person from meeting the criteria or if the program itself does not work for the person, the person could end up pursuing readiness forever.

Example. A person on a structured behavior-management unit makes good initial progress but then remains at the same level of behavior for more than a year. Obviously, the program is not working for that person, yet the person is not allowed to leave the program until it does work. Under the readiness approach, no one considers either trying another way or restructuring community services to serve the person as is.

 - d. People are required to learn and demonstrate skills in artificial settings, despite the fact that people are likely to learn better and be more motivated doing real-life activities in natural settings.
 - e. The focus on preset criteria never requires the program to question how accommodations or support services could be provided to allow the person to function in normal settings.
4. *Assumptions that the individual must fit into available services.* It is quite common for evaluators to think only in terms of service forms that are already available. For example, a person who is profoundly disabled is said to need adult daycare because no program exists to support that person in doing work.

5. Evaluation Contents [§ 5.44]

a. A Support Model of Services [§ 5.45]

The readiness model described in the preceding section assumes that people are *broken* and must be *fixed* before they can have normal life experiences. People who cannot be fixed are permanently precluded from having those experiences.

The alternative to the readiness model is the *support model*, which asks which accommodations and supports are required for the person to receive needed treatment and protection and to live, learn, have fun, and be active and productive in normal environments. The focus shifts from one of fitting the person into existing services to one of focusing on providing a life for the person that meets the person's preferences and needs. See John O'Brien & Herbert Lovett, *Finding a Way Toward Everyday Lives: The Contribution of Person Centered Planning* (1992), https://inclusion.com/site/wp-content/uploads/2019/12/everyday_lives.pdf.

The following are examples of services designed on a support model:

1. John has a serious and persistent mental illness., If left alone, he would likely sit in his room all day without activities or friends, not take care of personal needs, and, eventually, stop taking his medications and regress. He is served by a community support program that works assertively to provide support to help him handle a volunteer job, help him get out to meet people, ensure that he has food and eats it, help him understand the need to stay clean, and make sure that he takes his medication.
2. Ann has severe cerebral palsy, is intellectually disabled, and has not lived outside a nursing home since childhood. She cannot meet her own physical needs and has limited understanding of the value of money. She lives in her own apartment, with an attendant paid for by supportive home care funds who helps her meet physical needs. An apartment-living program helps her handle living there and supervises the attendant. It also teaches her home management, community-living, and money management skills. A representative payee makes sure that essential bills are paid and gives her an allowance for living needs.
3. Mary is considered severely disabled, with characteristics of autism spectrum disorder. She does not speak well and has a history of not attempting to communicate with people she does not know well. She works in a hospital supply room, where she earns a wage based on her productivity. She has learned to recognize landmarks that enable her to use the city bus to get there. A job coach provides job design, training, and supervision for Mary and two other employees. She does not tell time but does recognize when the clock indicates that it is time to take a break. Her parents report major gains in communication skills, maturity, self-image, and sociability.

b. Consideration of All Individual and Human Needs [§ 5.46]

To determine whether an evaluation is comprehensive, the guardian ad litem must determine whether the evaluation looks at the service implications of all the person's individual and human needs or whether it focuses on some issues to the exclusion of others. To this end, the evaluation should provide information and recommendations needed to implement, as far as possible, the components of a valued life identified in section [5.14](#), *supra*. That is, it should provide information and recommendations to achieve the following:

1. Prevent abuse, financial exploitation, and neglect, and promote safety, health, and comfort;
2. Avoid making decisions the client can make independently and help the person develop decision-making skills;
3. Allow and support the client to be part of the home community;
4. Avoid disrupting the client's relationships and offer the client support to develop and maintain relationships;
5. Provide the client with the opportunity and skills to be active, self-sufficient, and productive;
6. Enhance the client's image as a valued citizen; and
7. Provide continuity in the client's relationships and experiences.

c. Functional Evaluations of Skills and Abilities Needed for Usual Life Experiences [§ 5.47]

Determining how a person can have usual life experiences requires careful evaluation of the skills and abilities needed to function in various settings and activities. Such evaluation is necessary to identify both the person's areas of strength and the person's need for training or special accommodation. Evaluations should look at the following:

1. How the person now uses existing skills and abilities;
2. What motivates the person to use skills and abilities;
3. What efforts at support or opportunities for learning have been provided;
4. How the person's characteristics, current environment, and past opportunities may affect current functional performance (and the validity of evaluation methods); and

5. What reasonable accommodations, supports, and goals might help the person retain, take advantage of, and expand skills and abilities.

The emphasis should be on functionality. A person need not be able to say “4:30 p.m.” to know that when the clock has a certain appearance the person should go home. A person need not pass a biology test to be able to express sexuality appropriately. A person can believe the person is a messiah and still shop at the local grocery store. To the greatest extent possible, the evaluation should identify exactly what the person needs to do to function in a particular environment and how the person can learn or be supported to do it.

d. Evaluations for Individualized Guardianships [§ 5.48]

Guardianship can be viewed as a support service: a *guardian* is a person appointed by a court to take the place of the person in exercising rights the person is unable to exercise, to help make decisions the person is unable to make, and to be an advocate for the person’s interests. A guardianship should be tailored to avoid depriving the person of rights and powers unless there is a functional reason for doing so.

Incompetence is not an all-or-nothing concept. A person could be unable to manage their own estate, requiring financial guardianship, but remain capable of making decisions about their physical well-being. Within either financial or personal guardianship, the law specifically requires that guardianships allow the ward to retain rights they are able to exercise. *See supra* § 5.17.

The most effective way to determine the extent of decision-making support needed is to break down the person’s need for support and protection into functional areas, such as medical decisions, personal needs, safety, relationships, etc. For each of these functional areas, the evaluator can then ask the following questions:

1. What decisions does the person face in this issue area? What decisions is the person likely to face in the foreseeable future?
2. For decisions relevant to the person’s life, is the person substantially able to understand all significant information on the nature, risks, and benefits of the various options, if explained to the person in a form t they are most likely to understand? If not, is this inability caused by a substantial, long-term mental disability?
3. Has the person had the opportunity to develop decision-making capacity through training and practice? Has the person received needed evaluation, training, and therapy to develop receptive and expressive language skills or provide alternative communication methods? If not, would this type of support be likely to help the person develop or restore decision-making ability?
4. If the person lacks the evaluative capacity to make a knowing choice, does this incapacity have a substantial impact on the ability to manage independently that person’s own finances or care?

With this approach, knowledge of the person’s day-to-day functioning skills and of the practical issues the person is likely to face is at least as important as diagnostic skills. Unfortunately, findings of incompetence are often based solely on medical or psychological opinions from professionals who have often met the person only in a clinical setting. This is not to say that medical or psychological diagnosis is not an important part of the test, but that it must be combined with information gathered from people who know and work with the person in the person’s typical environments.

Often, competence evaluations focus on issues that do not relate to relevant functional issues. For example, “orientation to time and place” is a frequent part of competence assessment in practice but is not by itself a test for competence under the law. For many people, in institutional settings or on the street, there is no functional reason to know what day it is or who is president. People without that knowledge might nevertheless have needed survival skills.

Note. The guardian ad litem is not an evaluator or expert witness but may need to make a judgment about whether it is or is not in the person’s best interests for the person to make the person’s own decisions in some or all areas of decision-making. *See Assessment of Older Adults Handbook, supra* § 5.17.

G. Obtaining Additional Evaluations and Information [§ 5.49]

Frequently, existing sources of information do not provide satisfactory answers to all the guardian ad litem's questions. In most cases, it is not difficult to find out what the client's current setting is like and how the client is responding to it. What is most often missing is a discussion of alternative placements and services, how the client could be supported in them, and the potential consequences of the services. When it appears that a current placement is overly restrictive, but no suitable alternative exists, it is important to be able to present a clear picture of what an alternative placement would look like, what support services and treatment would be needed, and how these would be delivered. A judge is unlikely to order an alternative placement unless its characteristics and feasibility have been clearly presented.

Barriers to obtaining this kind of evaluation include the following:

1. The best evaluator, who is often someone experienced in designing or providing services for people with similar abilities and needs, might not be available locally and might have other responsibilities that limit the evaluator's availability.
2. Thorough evaluation and service design can take a long time, and the need for a placement decision might not allow for delay.
3. Courts are more accustomed to ordering medical and psychological examinations; persuading a court to order other forms of evaluation could be difficult.
4. Good evaluations could be expensive.

The following strategies might be useful in obtaining needed evaluations for the person:

1. The resources listed in [appendix 5B](#), *infra*, can often provide names of people or agencies who can provide good independent evaluations.
2. People who qualify for Family Care, *see infra* § [5.54](#), have a right to assessment and service planning that can provide useful information. The state offices that administer these programs are excellent resources for information on community long-term support services and assessment requirements. Links to information on Wisconsin's long-term care programs for people who are elderly and people who have physical and developmental disabilities are available on the DHS website, at <https://www.dhs.wisconsin.gov/long-term-care-support.htm> (last revised Jan. 25, 2023). Links to information on community mental-health and substance-abuse programs are available on other pages of the DHS website, at <https://www.dhs.wisconsin.gov/mh/phlmhindex.htm> (last revised Aug. 5, 2024), and <https://www.dhs.wisconsin.gov/aoda/index.htm> (last revised Oct. 15, 2023).
3. The guardian ad litem may ask the court to order further evaluation by the county, or independent evaluation. *See supra* § [5.38](#).
4. If time is a problem, the court may be willing to order a placement pending further evaluation and to schedule a review hearing when the evaluation is completed.
5. If the person has had no experiences in nonrestrictive environments, positive programming, or treatment, it might be useful first to arrange or advocate for such opportunities to be provided while the person remains in the current placement. That is, a person in an institution might be able to go out to a community work program, be involved in one-to-one activities in community settings, or have trial visits to a community residence. Evidence from these experiences can then be used in future review hearings to argue for changes in placement or services.

VII. Long-Term Support Services in Wisconsin [§ 5.50]

A. Support Packages in General [§ 5.51]

A community-based long-term support package for an individual can be quite complex, and involve multiple funding sources, programs, and service agencies. For example, an individual with developmental disabilities in a supported apartment might have supports from the following:

1. Supplemental Security Income (SSI), including a special state supplement, for basic room and board;
2. Family Care operated by a CMO; and
3. Medicaid nursing, home-health, and personal-care services, funded by the state through Medicaid, but not part of Family Care and without case management by the county. *See infra* § 5.52 (discussing card services).

Sections 5.52–5.58, *infra*, examine some of the programs that might form part of a long-term support package.

B. Medical Assistance Program (Medicaid) [§ 5.52]

Note. The DHS now refers to the medical assistance program for elderly, blind, and disabled persons as “Medicaid” or “EBD Medicaid,” one part of the ForwardHealth program, and Medicaid is the term used in this chapter. The term “medical assistance” is still used in the governing state statutes, [Wis. Stat.](#) §§ 49.43–499. For an in-depth discussion of the Medicaid program, see 2 Andrew J. Adams et al., [Advising Older Clients and Their Families](#) ch. 11 (State Bar of Wisconsin 5th ed. 2023).

By far the largest source of funds for long-term support services in Wisconsin is from Medicaid, established by [Wis. Stat.](#) §§ 49.43–499 and governed by [Wis. Admin. Code](#) chs. DHS 101–109. Medicaid is available to people who are age 65 or older or are disabled, and who meet the program’s income and resource tests.

Medicaid is a federal grant-in-aid program under Title XIX of the Social Security Act. 42 [U.S.C.](#) §§ 1396–1396w-8. This means that for every dollar the state spends in accordance with the program, it receives a set amount back from the federal government. This amount varies from year to year, but historically Wisconsin’s reimbursement has been approximately 60 cents per dollar.

The DHS’s Division of Medicaid Services administers traditional Medicaid services, referred to as *card services*, at the state level. *See infra* [app. 5B](#). Providers are certified directly by the state, and they bill through the state’s contracted billing agencies. The program is an entitlement with *sum-sufficient* funding, which means that a person who receives a covered service from a certified provider is assured that the provider will be paid. Some services require prior authorization, which again is provided at the state level.

Medicaid card services are described in [Wis. Admin. Code](#) ch. DHS 107. Those most relevant to long-term support include the following: services in nursing facilities and ICF/IDs; home-health, private-duty-nursing, and personal-care services; mental-health treatment services; physical, occupational, and speech therapies; and durable medical equipment. Medicaid does not require that the person be confined to the person’s home to receive these services, and they are now an important part of the long-term support service package for many people.

Denials of eligibility and denials or reductions of service coverage can be appealed through an administrative fair hearing process. [Wis. Admin. Code](#) § DHS 104.01(5). The statutory reference for the hearing process is [Wis. Stat.](#) § 49.45(5). *See also* [Wis. Admin. Code](#) § HA 3.03 (right to appeal).

A hearing is available under the Family Care program if there is a denial of a request for services. *See* [Wis. Stat.](#) § 46.287(2)(a)1.f.

Note. The May 2024 updates to the *Medicaid Waiver Manual*, *see supra* § 5.14, are at <https://www.dhs.wisconsin.gov/waivermanual/index.htm>. The full updated *Medicaid Waiver Manual* is at <https://www.dhs.wisconsin.gov/publications/p02256.pdf>.

The Medicaid funding system has created a tremendous incentive for states to try to cover long-term support services under Medicaid. When it began, Medicaid funding for long-term support was heavily weighted toward institution-based services. Until the early 1980s, a person in need of substantial long-term support services and dependent on Medicaid funding had little choice but to receive the services in a nursing home, and this fact largely accounted for the enormous growth in nursing homes in the 1960s and 1970s. County mental-health centers and the state developmental disabilities centers were also relicensed to take advantage of Medicaid funds.

Starting in the early 1980s, the federal government began granting home and community-based services waivers to states to allow states to provide long-term support in typical homes and community settings. Wisconsin developed several programs under HCBS (home and community-based services) waivers. These programs differed significantly from Medicaid card services in that they were operated by county long-term support agencies, and were capped, both in terms of the number of people who can be served and in the average cost per person. In 1998, the state received a waiver to develop a case-managed long-term care system called Family Care. Family Care is different from HCBS waivers in that all long-term support services are managed through a single agency, operating under capitated (per-member) funding. *See infra* § 5.54. Since July 2018, Family Care has become the dominant program by which long-term care support services are provided to elderly people and people with disabilities, other than people with a primary diagnosis of mental illness. *See supra* § 5.28, *infra* § 5.54.

C. Family Care and Other Managed Long-Term Care Programs and Waivers [§ 5.53]

1. Family Care [§ 5.54]

The Family Care program, governed by [Wis. Stat.](#) §§ 46.2805–.2899 of the Wisconsin Statutes and [Wis. Admin. Code](#) ch. DHS 10, is a statewide program that substantially redesigns funding and delivery of long-term supports for people who are elderly and for people with developmental or physical disabilities by moving to a managed care model, administered by private CMOs rather than by county government.

The first Family Care pilot programs were authorized in 1998, under a federal waiver that allowed for the managed care approach. Wisconsin later expanded Family Care statewide. By July 1, 2018, all of Wisconsin’s 72 counties were participating in Family Care. *See* Wis. Dep’t of Health Servs., *Family Care*, <https://www.dhs.wisconsin.gov/familycare/index.htm> (last revised Sept. 17, 2024).

Under Family Care, the state established single, centralized sources of information and assistance, called “aging and disability resource centers” (ADRCs). *See* [Wis. Stat.](#) § 46.283. [Wis. Stat.](#) § 46.283(3)(f) was amended to broaden the scope of required ADRC services to include “the family care benefit or the Family Care Partnership program, or the program of all-inclusive care for the elderly.” *See* 2019 Wis. Act 9. A list of ADRCs by county, with linked contact information, is at <https://www.dhs.wisconsin.gov/adrc/consumer/index.htm> (last revised Jan. 2, 2024). In addition, Family Care does the following:

1. Combines all major sources of funding for long-term support into a single flexible program to be implemented at the local level;

Note. Individuals who choose not to participate in Family Care still have access to Medicaid card services, including nursing homes, *see supra* § 5.52, but do not have access to home and community based long term care services.

2. Provides an entitlement to services for people who meet level-of-need standards, [Wis. Stat.](#) § 46.286(3);
3. Creates CMOs, *see supra* §§ 5.28, 5.51, at the local level, to provide long-term support services, [Wis. Stat.](#) § 46.284;

Note. MCOs receive a capitated rate for each enrollee, have broad flexibility in service design and delivery to achieve contract outcomes, and share in the financial risk if spending exceeds funding. The first MCOs were county agencies, but currently all MCOs are nongovernmental organizations.

4. Establishes value-based consumer outcomes and performance measures and requires individualized assessment and planning, [Wis. Admin. Code](#) § DHS 10.44(2)(e)2.; and
5. Requires MCOs to provide a self-directed support option, defined in the statute as “a mechanism by which an enrollee may arrange for, manage, and monitor his or her family care benefit directly or with the assistance of another person chosen by the enrollee.”

[Wis. Stat.](#) § 46.284(4)(e); *see also* [Wis. Admin. Code](#) § DHS 10.44(6); Wis. Dep’t of Health Servs., *Family Care*, <https://www.dhs.wisconsin.gov/familycare/index.htm> (last revised Sept. 17, 2024). The Family Care MCO contract provides a detailed description of the MCO’s responsibilities. *See* Wis. Dep’t of Health Servs., *Family Care Contract Between Wis. Dep’t of Health Servs., Div. of Medicaid Servs. and MCO* (issued Jan. 1, 2024), <https://www.dhs.wisconsin.gov/familycare/mcos/fc-fcp-2024-contract.pdf>.

In addition to the self-support option within Family Care, the state also operates a separate self-directed supports waiver for Family Care counties called IRIS (Include, Respect, I Self-Direct), which allows individuals to plan and self-direct individualized support services. See Wis. Dep't of Health Servs., *IRIS (Include, Respect, I Self-Direct)*, <https://www.dhs.wisconsin.gov/iris/index.htm> (last revised Sept. 17, 2024). This is an option for people who want more control over their services or who are not satisfied with the providers or forms of services available through regular Family Care.

Ombudsman program services to provide information and advocacy for Family Care and IRIS applicants and recipients are available for people 60 years old and older from the Board on Aging and Long Term Care and for people under age 60 from Disability Rights Wisconsin. See Wis. Board on Aging & Long Term Care, *Ombudsman Program*, <https://longtermcare.wi.gov/Pages/Ombudsman.aspx> (last visited Aug. 30, 2024); Disability Rights Wisconsin, *Family Care and IRIS Resources*, <https://www.disabilityrightswi.org/resources/family-care-and-iris-resources/> (last visited Sept. 30, 2024).

2. Family Care Partnership Program [§ 5.55]

Wisconsin's Family Care Partnership Program is a comprehensive program of health and long-term support services for older adults and adults with developmental or physical disabilities. See Wis. Dep't of Health Servs., *Family Care Partnership*, <https://www.dhs.wisconsin.gov/familycare/fcp-index.htm> (last revised Jan. 16, 2024). It operates via a waiver under 42 U.S.C. § 1315. Contractors receive a capitated payment of Medicare and Medicaid funds on behalf of the individual. This rate is then used to provide integrated, managed health and community-based services, physician services, and all medical care. Like other parts of Family Care, it is a managed care program, and Partnership MCOs operate under the same MCO contract as regular Family Care MCOs, with the addition of the medical component. Information on the Partnership Program is on the DHS website, at <https://www.dhs.wisconsin.gov/familycare/fcp-index.htm> (last revised Jan. 16, 2024). The Partnership Program and the similar Program of All-Inclusive Care for the Elderly (PACE) are only available in some Wisconsin counties, as illustrated on the map at *Partnership/PACE Geographic Service Regions*, <https://www.dhs.wisconsin.gov/publications/p01789.pdf> (Jan. 2023).

3. Job-Coaching Programs (Employment First) [§ 5.56]

In 2018, the Wisconsin Legislature passed 2017 Wis. Act 323 to improve the employment options for people with disabilities enrolled in long-term care programs, endorsing a concept known as *Employment First*. See, e.g., Wis. Bd. for People with Developmental Disabilities (BPDD), *Find out About Employment First in Wisconsin*, <https://wi-bpdd.org/index.php/2017/04/28/find-out-about-employment-first-in-wisconsin/> (Apr. 28, 2017). Under Wis. Stat. § 46.2898(2), Wisconsin provides funding and requires the BPDD to

develop a program to provide coaching for the hiring of individuals with disabilities and ... do all of the following:

- (a) Develop a model of coaching businesses in the hiring and employment of individuals with disabilities that engages businesses directly.
- (b) Expand awareness and competence across the private sector in hiring individuals with significant disabilities who are enrollees of family care, the Family Care Partnership Program, or the self-directed services option.

...

D. Supplemental Security Income (SSI) [§ 5.57]

Note. For an in-depth discussion of SSI and other governmental income security programs, see 1 Andrew J. Adams et al., *Advising Older Clients and Their Families* ch. 9 (State Bar of Wis. 6th ed. 2024).

SSI provides income maintenance payments to people who are age 65 or older, blind, or disabled, and who meet income and resource standards. See 42 U.S.C. §§ 1381–1383f. It is an important source of funds for basic living expenses in community settings, particularly because Medicaid waiver rules limit use of Medicaid funds for room and board expenses. People on SSI generally receive both a federal SSI payment and a state supplement. The federal payment is administered by the Social Security Administration and increases with the cost of living. The state supplement is administered separately by an agency under contract with the DHS and does not increase with inflation. A special increased state supplement level called SSI-E is available for people who need 40 or more hours

per month of supportive home care, daily living skills training, or community support services. [Wis. Stat.](#) § 49.77(3s)(a). The person must be certified by the county to get this increased payment level. See [Wis. Stat.](#) § 49.77(3s)(c).

The state supplement should be paid automatically to a person getting a federal SSI check. A state supplement is also paid to a small number of people who were receiving a state check, but not a federal SSI check, in December 1995. See [Wis. Stat.](#) § 49.77(2)(a)3.

Apart from this specific group of recipients, people with countable income that is higher than the federal payment level are no longer eligible for a state supplement payment. For more information on SSI eligibility and payment levels, see Roy Froemming, Wis. Bd. for People with Developmental Disabilities, *One Step Ahead* (3d ed. 2009), https://wi-bpdd.org/wp-content/uploads/2016/09/OSA-Revised_2005.pdf.

E. Community Support Services for People with Mental Illness [§ 5.58]

Community support programs (CSPs) for chronically mentally ill persons, governed by [Wis. Admin. Code](#) ch. DHS 63, provide Medicaid-funded treatment, rehabilitation, and support services in the community where persons with chronic mental illness live and work.

Comprehensive community services (CCS) for people with mental illness and substance abuse disorders, governed by [Wis. Admin. Code](#) ch. DHS 36, provide Medicaid-funded individualized, community-based, psychosocial rehabilitation services authorized by a mental-health professional for such individuals.

Psychosocial services provided through a community-based psychosocial service program are now Medicaid-covered services. [Wis. Stat.](#) §§ 49.45(30e), 49.46(2)(b)6.Lm.; [Wis. Admin. Code](#) § DHS 107.13(7). For information, including a link to a list of counties that have certified programs, see Wisconsin Department of Health Services, *Comprehensive Community Services (CCS)*, <https://www.dhs.wisconsin.gov/ccs/index.htm> (last revised Nov. 16, 2023). As with community support program services, the county must provide the state share of Medicaid—about 40% of total costs.

Community Recovery Services (CRS) are a covered Medicaid benefit for people with mental illness. See [Wis. Stat.](#) § 49.45(30g). The CRS program provides federal Medicaid reimbursement to participating counties for funds expended on three specific types of services under the umbrella of psychosocial rehabilitation: community living supportive services, supported employment, and peer supports. Information on CRS is on the DHS website at <https://www.dhs.wisconsin.gov/crs/index.htm> (last revised Aug. 17, 2023).

For people with more intensive needs, Medicaid-funded community support programs under [Wis. Admin. Code](#) ch. DHS 63 provide effective and easily accessible community-based treatment. For more information on mental-health services, see the following page on the DHS website: <https://www.dhs.wisconsin.gov/mh/index.htm> (last revised Aug. 18, 2024). [Wis. Stat.](#) § 51.421 requires that each DCP establish a community support program for people with serious and persistent mental illness. Standards for these programs are contained in [Wis. Admin. Code](#) ch. DHS 63. Services must be planned and delivered under an individualized assessment and service plan. [Wis. Stat.](#) § 51.421(2). Available services include case management, residential support services, day services, work-related services, counseling, daily living skills training, home modification, adaptive equipment, home health, personal care, habilitation, respite, day treatment, and psychosocial services. See *id.* Community support services can be funded as Medicaid services, making the services more affordable for counties. See [Wis. Admin. Code](#) § DHS 107.13(6). However, unlike most other Medicaid card services, counties must provide the state portion of funding. As a result, local service availability is dependent on county funding commitments.

F. Residential and Institutional Placements [§ 5.59]

The law requires approval of certain admissions by specified agencies. This approval is a requirement in addition to the consent of the individual or guardian or a court order for admission. Agency approval requirements include the following:

1. If voluntary admission is being made to a state treatment facility or to any treatment facility through a county department under [Wis. Stat.](#) § 51.42 or 51.437, the approval of the facility director (or designee) and the approval of the county department with responsibility under [Wis. Stat.](#) §§ 51.42 and 51.437 are required for the admission. [Wis. Stat.](#) § 51.10(1), (2); see also [Wis. Stat.](#) § 51.05(2).

2. If admission is being made to a nursing facility (a nursing home that is not an ICF/ID) or an institution for mental diseases, preadmission screening is required to determine whether the person is developmentally disabled or has a mental illness, and, if so, whether the person needs nursing facility services or active treatment for the developmental disability or mental illness. [Wis. Stat. § 49.45\(6c\)](#); *see also* 42 [C.F.R.](#) §§ 483.100–.138. There is an exception for a post-hospital, medically prescribed recovery period of up to 30 days. [Wis. Stat. § 49.45\(6c\)\(e\)1](#).
3. Except in an emergency, a person with mental illness or developmental disabilities may be admitted to a nursing home, ICF-ID, or institution for mental diseases only if the admission has been recommended by the county department with responsibility under [Wis. Stat. §§ 51.42 and 51.437](#). *See* [Wis. Stat. §§ 50.04\(2r\), 51.42\(3\)\(as\), 51.437\(4m\)\(L\)](#).

VIII. Appendices [§ 5.60]

A. Appendix 5A: Types of Adult Residential and Institutional Placements [§ 5.61]

There is a confusing and sometimes overlapping array of categories of residential and institutional facilities in Wisconsin. The law on admissions can vary depending on the type of facility involved. This section attempts to describe the various categories.

1. **Adult family home (three or four residents).** The term *adult family home* is defined in the statutes as a place serving three or four adult residents who receive care, treatment or services that are above the level of room and board and that may include up to seven hours per week of nursing care per resident. [Wis. Stat. § 50.01\(1\)\(b\)](#); *see also* [Wis. Stat. § 50.01\(1\)\(a\)](#) (alternative definition for “private residence” serving as adult family home); [Wis. Admin. Code § DHS 82.02\(2\)](#). Adult family homes for three or four people must be either certified ([Wis. Admin. Code](#) ch. DHS 82) or licensed ([Wis. Admin. Code](#) ch. DHS 88).
2. **Adult family home (one or two residents).** The term adult family home is also used for living situations that provide residential support services for one or two adults. An adult family home may be the family home of the caregiver(s), but this type of placement also includes homes with support service providers who live in the home or who routinely visit the home. They are not licensed but must be certified to be funded under a Medicaid long-term support program. Currently, certification requirements are the same as the certification requirements for statutory adult family homes in [Wis. Admin. Code](#) ch. DHS 82.
3. **Residential care apartment complex (RCAC).** A *residential care apartment complex* is a category of facility in which 5 or more adults reside that consists of each living unit as an independent apartment, and in which no more than 28 hours of services are provided to a resident per week. [Wis. Stat. § 50.01\(6d\)](#). The residential care apartment complex used to be known as an *assisted living facility*.
4. **Community-based residential facilities (CBRFs).** With some exceptions, a *CBRF* is a place in which five or more adults, who are not related to the operator, reside, and in which care, treatment, or services above the level of room and board, but that include no more than three hours of nursing care per week per resident, are provided as a primary function of the facility. [Wis. Stat. § 50.01\(1g\)](#). Under [Wis. Admin. Code](#) ch. DHS 83, a CBRF may provide nursing care to a resident for more than three hours per week if it meets limits on the total number of residents needing nursing care and on the length of time for which nursing care is needed; an exception also applies if the DHS grants a waiver or if the DHS has received request for a waiver from the CBRF and a decision on the request is pending. [Wis. Admin. Code § DHS 83.27\(1\)\(b\)](#).
5. **Facility serving people with developmental disabilities (FDD).** An *FDD* is a facility or portion of a facility licensed under [Wis. Admin. Code](#) ch. DHS 134 primarily to serve people with developmental disabilities who require active treatment. All current FDDs are certified for Medicaid funding as ICF/IDs.

Note. To meet the definition of an FDD, the facility must have a capacity of four or more “individuals who need and receive active treatment and health services as needed.” [Wis. Admin. Code § DHS 134.13\(13\)](#).

6. **Institution for mental diseases (IMD).** An *IMD* is a hospital, nursing home, or other facility with more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care for people with mental illness. [Wis. Stat. § 49.43\(6m\)](#) (referring to 42 [C.F.R. § 435.1010](#)). The category is important because residents between the ages of 22 and 65 are not eligible for Medicaid. The

state has provided separate funding for counties to pay for nursing facilities that are IMDs and to shift resources to community forms of care. See [Wis. Stat.](#) § 49.45(6m).

7. **Intermediate care facility for the mentally retarded (ICF-MR) or intermediate care facility for persons with intellectual disabilities (ICF/ID).** An *ICF-MR* (ICF/ID) is a nursing home that is licensed as an FDD and that is certified under the Medicaid program to provide active treatment to people with an intellectual disability and related conditions, defined similarly to the state definition of people with developmental disabilities. See 42 [U.S.C.](#) § 1396d(d) (defining *intermediate care facility for mentally retarded*); [Wis. Stat.](#) § 51.01(5) (defining *developmental disability*). One difference between the state and federal definitions is that “related conditions,” including brain injury, are included in the federal definition only if they are manifested before age 22. 42 [C.F.R.](#) § 435.1010 (defining *persons with related conditions*). Certification standards can be found at 42 [C.F.R.](#) pt. 483. A *distinct part ICF-MR* is an FDD located in the same physical facility as a nursing facility or an IMD.
8. **Inpatient facility.** An *inpatient facility* is defined very narrowly in [Wis. Stat.](#) § 51.01(10) to include only public or private hospitals and hospital units that have the primary purpose of diagnosing, treating, and rehabilitating mental illness, developmental disability, or substance abuse. Inpatient facilities include Mendota and Winnebago Mental Health Institutes and private psychiatric hospitals. An inpatient facility is a type of treatment facility.
9. **Nursing facility.** A *nursing facility*, for purposes of Medicaid, is a nursing home that is not an FDD or an IMD. See 42 [U.S.C.](#) § 1396r(a); [Wis. Stat.](#) § 49.498.
10. **Nursing home.** With limited exceptions, a *nursing home* is any place that provides 24-hour services to five or more residents, including limited nursing care, intermediate level nursing care, and skilled nursing services. [Wis. Stat.](#) § 50.01(3). This definition overlaps with that of CBRF; the central distinction is that a CBRF cannot provide nursing care as a primary function of the facility. The term *nursing home* includes nursing facilities licensed under [Wis. Admin. Code](#) ch. DHS 132 and FDDs licensed under [Wis. Admin. Code](#) ch. DHS 134. Licensing and regulation are carried out by the Division of Quality Assurance.
11. **State center for the developmentally disabled (DD Center).** A DD Center is one of the three state-operated institutions for people with developmental disabilities: Northern Wisconsin Center (Chippewa Falls), Central Wisconsin Center (Madison), and Southern Wisconsin Center (Union Grove). The DD Centers are licensed as FDDs and certified as ICF/IDs for Medicaid. The DD Centers are now primarily devoted to services for people with complex medical or behavioral needs. Div. of Long Term Care, Wis. Dep’t of Health Servs., *Developmental Disability Programs and Information*, <https://www.dhs.wisconsin.gov/disabilities/index.htm> (last revised Aug. 29, 2024).
12. **Treatment facility.** A treatment facility, which may be either inpatient or outpatient, is defined in [Wis. Stat.](#) § 51.01(19) as a facility that provides treatment for alcoholic, drug dependent, mentally ill, or developmentally disabled persons. A nursing home, CBRF, or adult family home may be a treatment facility if it provides treatment to people with these conditions.

B. Appendix 5B: Resources [§ 5.62]

The resources listed below can be useful sources of further information on specific disabilities, evaluation resources, long-term support services, and government programs. Many relate to local affiliates and regional and county services agencies serving particular areas.

Statewide Disability and Aging Organizations

Alzheimer’s Association–Wisconsin Chapter

(Chapter offices located in Chippewa Falls, Green Bay, La Crosse, Madison, Milwaukee, Rhinelander, and Wausau)

(800) 272-3900

Web: <https://www.alz.org/wi/>

Autism Society of Greater Wisconsin

1477 Kenwood Dr.

Menasha, WI 54952

(920) 558-4602/(888) 428-8476

Web: <https://www.autismgreaterwi.org>

Autism Society of South Central Wisconsin

437 S. Yellowstone Dr., Ste. 219

Madison WI 53719

(608) 630-9147

Web: <https://autismsouthcentral.org>

Autism Society of Southeastern Wisconsin

3720 N. 124th Street, Ste. O

Wauwatosa, WI 53222

(414) 988-1260

Fax: (414) 877-1194

Web: <https://www.asew.org>

Brain Injury Alliance of Wisconsin

University of Wisconsin-Eau Claire

105 Garfield Ave., Rm. HSS 248

Eau Claire, WI 54701

(262) 790-9660

Web: <https://biaw.org>

Broadscope Disability Services

(formerly known as UCP of Southeastern Wisconsin)

6102 W. Layton Ave.

Greenfield, WI 53220

(414) 329-4500

Fax: (414) 329-4510

Web: <https://broadscope.org>

Coalition of Wisconsin Aging & Health Groups (CWAG)

30 W. Mifflin St., Ste. 406

Madison, WI 53703

(608) 224-0606/(800) 488-2596

Web: <http://www.cwag.org>

Disability Service Provider Network (DSPN)

2418 Crossroads Dr., Ste. 1600

Madison, WI 53718

(608) 444-0736

Web: <https://www.dspn.org>

Easter Seals Wisconsin

8001 Excelsior Dr., Ste. 200

Madison, WI 53717

(608) 277-8288 (voice)/(608) 277-8031 (TTY)/(800) 422-2324

Fax: (608) 277-8333

Web: <https://www.eastersealswisconsin.com>

NAMI Wisconsin (National Alliance on Mental Illness)

414 Atlas Ave

Madison, WI 53714

(608) 268-6000

Web: <https://www.namiwisconsin.org>

Opportunity, Inc.

388 River Dr.
Wausau, WI 54403
(715) 572-8823
Web: <https://www.oppincwi.org/>

United Cerebral Palsy (UCP) of Greater Dane County

Web: <https://www.ucpdane.org/>

UCP of Greater Dane County—Madison Office
2801 Coho St., Ste. 100
Madison, WI 53713
(608) 273-4434

UCP of Greater Dane County—Janesville Office
200 W. Milwaukee St.
Janesville, WI 53548
Phone: 608-898-4400

United Cerebral Palsy (UCP) of West Central Wisconsin

2153 Eastridge Center
Eau Claire, WI 54701
(715) 832-1782
Web: <https://www.ucpwcw.org/>
(Serving Barron, Buffalo, Chippewa, Dunn, Eau Claire, Jackson, Pepin, Pierce, Polk, Rusk, St. Croix, and Trempealeau Counties)

Vision Forward Association

912 N. Hawley Rd.
Milwaukee, WI 53213
(414) 615-0100/(855) 878-6056
Fax: (414) 256-8744
Web: <https://www.vision-forward.org>

Waisman Center

University of Wisconsin-Madison
1500 Highland Ave.
Madison, WI 53705
(608) 263-3301 (clinics)
Web: <https://www.waisman.wisc.edu/>
(Research, training, service, and outreach on human development, developmental disabilities, and neurodegenerative diseases)

Wisconsin Council of the Blind & Visually Impaired

754 Williamson St.
Madison, WI 53703
(608) 255-1166/(800) 783-5213
Fax: (608) 255-3301
Web: <https://www.wcblind.org>

Wisconsin Independent Living Centers

Access to Independence
3810 Milwaukee St.
Madison, WI 53714
(608) 242-8484/(800) 362-9877
Web: <https://www.accesstoind.org>

Center for Independent Living for Western Wisconsin (CILWW)

CILWW Menomonie
2920 Schneider Ave. S.E.
Menomonie, WI 54751
(715) 233-1070/(800) 228-3287
Fax: (715) 233-1083
Web: <https://www.cilww.com>

CILWW Rice Lake
2021 Cenex Dr., Ste. D
Rice Lake, WI 54868
(715) 736-1800
Fax: (715) 736-0265

Independence First (main office)
540 S. 1st St.
Milwaukee, WI 53204-1605
(414) 291-7520
Web: <https://www.independencefirst.org>

Independent Living Resources
La Crosse Office
4439 Mormon Coulee Rd.
La Crosse, WI 54601
(608) 787-1111/(888) 474-5745
Fax: (608) 787-1114
Web: <https://www.ilresources.org>

Richland Center Office
1313 W. Seminary St.
Richland Center, WI 53581
(608) 647-8053/(888) 474-5745

indiGO
2911 Tower Ave., Ste. 9
Superior, WI 54880
(715) 392-9118/(800) 924-1220
Web: <https://indigowi.org>

Midstate Independent Living Choices, Inc. (MILC)
3262 Church St.
Stevens Point WI 54481
(715) 344-4210/(800) 382-8484
Fax: (715) 344-4414
Web: <https://www.milc-inc.org/>

Options for Independent Living, Inc.
Green Bay Office
555 Country Club Rd.
Green Bay, WI 54313
(920) 490-0500/(888) 465-1515
Fax: (920) 490-0700
Web: <http://www.optionsil.org>

Society's Assets
Racine Office

5200 Washington Ave., #225
Racine, WI 53406-4238
(262) 637-9128/(800) 378-9128
Web: <https://societyassets.org>

Kenosha Office
5455 Sheridan Road, Suite 101
Kenosha, WI 53140-4103
(262) 657-3999/(800) 317-3999
Fax: (262) 657-1672

Elkhorn Office
615 E. Geneva Street
Elkhorn, WI 53121-2301
(262) 723-8181/(800) 261-8181
Fax: (262) 723-8184

Wisconsin Independent Living Network (ILCW)

3810 Milwaukee St.
Madison, WI 53714
(608) 575-9293
Web: <https://il-wis.net>

Legal Advocacy Resources

Disability Rights Wisconsin (Madison office)

1502 W. Broadway, Ste. 201
Madison, WI 53713
(608) 267-0214/(800) 928-8778
Fax: (833) 635-1968
Web: <https://www.disabilityrightswi.org>

Disability Rights Wisconsin (Milwaukee office)

6737 W. Washington St., Ste. 3230
Milwaukee, WI 53214
(414) 773-4646/(800) 928-8778
Fax: (833) 635-1968

Greater Wisconsin Agency on Aging Resources, Inc. (GWAAR)

(including Wisconsin Guardianship Support Center)
1414 MacArthur Rd., Ste. A
Madison, WI 53714
(608) 243-5670
Fax: (866) 813-0974
Web: <https://www.gwaar.org/>

Legal Aid Society of Milwaukee, Inc.

(downtown Milwaukee office)
728 N. James Lovell St., 3rd Fl., N. Ste.
Milwaukee, WI 53233
(414) 727-5300
Fax: (414) 291-5488
Web: <https://legalaidmke.com/>
(Mental disability and poverty law)

Legal Assistance to Incarcerated People Project (LAIP)

University of Wisconsin Law School

975 Bascom Mall, Room 4318

Madison, WI 53706

(608) 262-1002

Web: <https://law.wisc.edu/fjr/laip/>

(Representation by law students of inmates in Wisconsin adult and juvenile correctional facilities)

Office of Wisconsin State Public Defender

P.O. Box 7923

Madison, WI 53707-7923

(608) 266-0087

Web: <https://www.wisspd.gov>

(Representation in civil commitment and protective placement proceedings)

Benefit Specialists

Benefit specialists help older adults and people with disabilities with issues related to benefits such as Medicare, Medicaid, Social Security, and health insurance. *Disability benefit specialists* serve adults with disabilities who are younger than 60 years old. *Elder benefit specialists* serve people who are 60 years old or older. *Work incentives benefit specialists* help people who receive disability benefits with questions related to employment income. See generally Wis. Dep't of Health Servs., *Benefit Specialists*, <https://www.dhs.wisconsin.gov/benefit-specialists/index.htm> (last revised May 30, 2024). The DHS also has a webpage for finding local Aging and Disability Resource Centers at <https://www.dhs.wisconsin.gov/adrc/consumer/index.htm> (last revised Jan. 2, 2024).

Disability Rights Wisconsin

Web: <https://www.disabilityrightswi.org>

(See “Legal Advocacy Resources,” *supra*, for specific office locations)

Greater Wisconsin Agency on Aging Resources, Inc.

(including Elder Benefit Specialist Program)

Web: <https://gwaar.org>

Legal Services Program Offices

Legal services programs provide legal representation, advice, information, and referral services to people with low incomes.

Legal Action of Wisconsin

Web: <https://www.legalaction.org/contact-us>

Legal Action of Wisconsin—Green Bay Area Office

318 S. Washington St., Ste. 310

Green Bay, WI 54301

(920) 432-4645/(855) 947-2529

Fax: (920) 432-5078

Web: <https://www.legalaction.org/contact-us/green-bay-area-office>

(Serving Brown, Calumet, Door, Kewaunee, and Manitowoc Counties)

Legal Action of Wisconsin—La Crosse Area Office

700 N. 3rd St., Ste. 203

La Crosse, WI 54601

(608) 785-2809/(855) 947-2529

Fax: (608) 782-0800

(Serving Buffalo, Crawford, Grant, Jackson, Juneau, La Crosse, Monroe, Richland, Trempealeau, and Vernon Counties)

Legal Action of Wisconsin—Madison Area Office

744 Williamson St., Ste. 200

Madison, WI 53703

(608) 256-3304/(855) 947-2529

Fax: (608) 256-0510

(Serving Columbia, Dane, Dodge, Green, Iowa, Jefferson, Lafayette, Rock, and Sauk Counties)

Legal Action of Wisconsin—Milwaukee & Waukesha Office

633 W. Wisconsin Ave., Ste. 2000

Milwaukee, WI 53203

(414) 278-7722/(855) 947-2529

Fax: (414) 278-7126

(Serving Milwaukee and Waukesha Counties)

Legal Action of Wisconsin—Oshkosh Area Office

300 Ohio St.

Oshkosh, WI 54902

(920) 233-6521/(855) 947-2529

Fax: (920) 233-0307

(Serving Adams, Fond du Lac, Green Lake, Marquette, Outagamie, Ozaukee, Sheboygan, Washington, Waushara, and Winnebago Counties)

Legal Action of Wisconsin—Racine Area Office

245 Main St., Ste. 202

Racine, WI 53403

(262) 635-8836/(855) 947-2529

Fax: (262) 635-8838

(Serving Kenosha, Racine, and Walworth Counties)

Legal Aid Society of Milwaukee, Inc.

Downtown Office

728 N. James Lovell St., Third Floor North Suite

Milwaukee, WI 53233

(414) 727-5300

Fax: (414) 291-5488

Web: <https://legalaidmke.com/>

Children's Court Office

10201 Watertown Plank Rd.

Wauwatosa, WI 53226

(414) 257-7159

Fax: (414) 257-7742

Judicare Legal Aid

401 N. 5th St., Ste. 200

P.O. Box 6100

Wausau, WI 54402-6100

(715) 842-1681/(800) 472-1638

Fax: (715) 848-1885

Web: <http://www.judicare.org>

(Serving Ashland, Barron, Bayfield, Burnett, Chippewa, Clark, Douglas, Dunn, Eau Claire, Florence, Forest, Iron, Langlade, Lincoln, Marathon, Marinette, Menominee, Oconto, Oneida, Pepin, Pierce, Polk, Portage, Price, Rusk, St. Croix, Sawyer, Shawano, Taylor, Vilas, Washburn, Waupaca, and Wood Counties and Wisconsin's 11 federally recognized Indian tribes)

State Disability and Aging Offices

DEPARTMENT OF HEALTH SERVICES (DHS)

Note. The DHS website provides a list of contacts by service area at <https://www.dhs.wisconsin.gov/data/service/search.htm>, and a departmental organization chart at <https://www.dhs.wisconsin.gov/aboutdhs/orgchartcoverpage.pdf>, which illustrate the services provided by the DHS.

General Contact Information:

1 W. Wilson St.
Madison, WI 53703
(608) 266-1865
Web: <https://www.dhs.wisconsin.gov>

Division of Medicaid Services (DMS)

P.O. Box 309
Madison, WI 53701-0309
(608) 266-8922
Web: <https://www.dhs.wisconsin.gov/dms/index.htm>

Division of Public Health (DPH)

P.O. Box 2659
Madison, WI 53707-2659
608-266-1865
Web: <https://www.dhs.wisconsin.gov/dph/index.htm>

Bureau of Aging and Disability Resources (BADR)

1 W. Wilson St., Room 551
Madison, WI 53703
(608) 266-2536
Web: <https://www.dhs.wisconsin.gov/dph/badr.htm>

(Office on Aging, Office for the Promotion of Independent Living (including Office for the Blind and Visually Impaired, Office for the Deaf and Hard of Hearing, and Office of Physical Disabilities and Independent Living), and Office for Resource Center Development)

Division of Care and Treatment Services (DCTS)

Web: <https://www.dhs.wisconsin.gov/dcts/index.htm>

Division of Quality Assurance

P.O. Box 2969
Madison, WI 53701-2969
(608) 266-8481
Fax: (608) 267-0352
Web: <https://www.dhs.wisconsin.gov/dqa/sections.htm>

(Enforcement of rights and regulations concerning nursing homes, residential facilities, home health services, etc.)

Related Councils and Boards

Wisconsin Board for People with Developmental Disabilities
101 E. Wilson St., Room 219
Madison, WI 53703
(608) 266-7826
Web: <https://www.wi-bpdd.org>

Wisconsin Council on Mental HealthEmail: dhs.wicouncilonmentalhealth@dhs.wisconsin.govWeb: <https://dhs.wisconsin.gov/wcmh/index.htm>**Wisconsin Council on Physical Disabilities**

1 W. Wilson St., Room 551

P.O. Box 2659

Madison, WI 53701-2659

(608) 266-5364

Web: <https://cpd.wisconsin.gov>**DEPARTMENT OF WORKFORCE DEVELOPMENT****Division of Equal Rights**

Madison Office Location

201 E. Washington Ave., Room A100

Madison, WI 53703

(608) 266-6860

Fax: (608) 267-4592

Web: <https://dwd.wisconsin.gov/er/contacts.htm>

(To file a discrimination complaint in employment, housing, or public accommodations)

Madison Mailing Address

P.O. Box 8928

Madison, WI 53708-8928

Milwaukee Office Location and Mailing Address

819 N. Sixth St., Room 723

Milwaukee, WI 53203

(414) 227-4384

Division of Vocational Rehabilitation

201 E. Washington Ave.

P.O. Box 7852

Madison, WI 53707-7852

(608) 261-0050/(800) 442-3477

Fax: (608) 266-1133

Web: <https://dwd.wisconsin.gov/dvr/>

Chapter 6

Guardianship: Wis. Stat. Ch. 54

[Margaret V. Kaiser](#)

I. Scope of Chapter [§ 6.1]

The guardianship statutes require appointment of a guardian ad litem (GAL) who serves as advocate for the best interests of the proposed ward. [Wis. Stat.](#) § 54.40(1), (3). This chapter of *The Guardian ad Litem Handbook* outlines the role and duties of the guardian ad litem in guardianship proceedings under [Wis. Stat.](#) ch. 54.¹

Note. The term “guardian ad litem” and the abbreviation “GAL” are used interchangeably throughout this chapter.

A portion of this chapter discusses the guardian ad litem’s duties in adult guardianship proceedings, including discussions about gathering information through interviews and records reviews, making requests to the court, representing a proposed ward at both contested and uncontested guardianship hearings, and obtaining payment. A discussion of the role of the guardian ad litem in guardianship appeals is also included, as is a discussion of the duties and obligations of a guardian ad litem in temporary guardianship proceedings.

Sections [6.46–.50, *infra*](#), discuss the role of the guardian ad litem in minor guardianships of the estate. For the role of the guardian ad litem in minor guardianships of the person, see [chapter 4, *supra*](#).

This chapter does not cover, except peripherally, the duties of a guardian ad litem in protective-services or protective-placement cases under [Wis. Stat.](#) ch. 55. A guardian ad litem should be aware of the interplay between [Wis. Stat.](#) chs. 54 and 55 because many guardianship cases involving adults also include requests under [Wis. Stat.](#) ch. 55. For the role of the guardian ad litem in [Wis. Stat.](#) ch. 55 cases, see [chapter 7, *infra*](#). For an overview of combined guardianship and protective-placement proceedings, see Maren Beermann, [Guardianship and Protective Placement for Older Adults in Wisconsin](#) (State Bar of Wis. 6th ed. 2023).

II. Adult Guardianships [§ 6.2]

A. Overview [§ 6.3]

[Wis. Stat.](#) § 54.10 permits a court to appoint a guardian of the person for a person found to be incompetent and a guardian of the estate for a person found to be a minor or spendthrift or incompetent. A guardian ad litem is required in all guardianship proceedings. [Wis. Stat.](#) § 54.40(1). Except for sections [6.46–.50, *infra*](#), and as otherwise specified, this chapter assumes that the guardian ad litem is representing an adult proposed ward in an initial incompetency proceeding.

A complete discussion of substantive and procedural guardianship law is beyond the scope of this chapter. For an overview of guardianship law, see Eve Dennison Pollock & Avery J. Mayne, [Guardianship, Conservatorship, and Durable Power of Attorney](#), in 1 Craig W. Albee et al., [Wisconsin Attorney’s Desk Reference](#) ch. 19 (State Bar of Wis. 13th ed. 2024). All guardianship proceedings under [Wis. Stat.](#) ch. 54, though, follow the same basic format:

1. A petition is filed alleging grounds under [Wis. Stat.](#) § 54.34.
2. A guardian ad litem is appointed to act in the best interests of the proposed ward under [Wis. Stat.](#) § 54.40.
3. A physician or psychologist or both furnish a written statement concerning the mental condition of the proposed ward, based on an examination of the proposed ward under [Wis. Stat.](#) § 54.36.
4. A hearing is held to determine the proposed ward’s competency, *see* [Wis. Stat.](#) § 54.44, and an order issues from that hearing, *see* [Wis. Stat.](#) § 54.46.

B. Role of the Guardian ad Litem [§ 6.4]

1. In General [§ 6.5]

a. Representation of Proposed Ward’s Best Interests [§ 6.6]

In all guardianship proceedings, the court must appoint an attorney as guardian ad litem to represent the best interests of the person subject to the proceedings. [Wis. Stat.](#) § 54.40(1), (3). The guardian ad litem must function independently in advocating for the proposed ward’s best interests and is not bound by the wishes of others, including those of the proposed ward, in determining what outcome would be in the proposed ward’s best interests. [Wis. Stat.](#) § 54.40(3).

b. Qualifications [§ 6.7]

(1) Absence of Conflicts of Interest [§ 6.8]

[Wis. Stat.](#) § 54.40 sets out the qualifications for the guardian ad litem and details the guardian ad litem's obligations and duties. At the outset, the statute prohibits an interested party, counsel for any party, or a relative or representative of an interested party from serving as the guardian ad litem. [Wis. Stat.](#) § 54.40(2). Ethical principles governing advocacy and representation further prohibit certain persons from serving as the guardian ad litem. These conflicts of interest may be less obvious, but are equally disqualifying, and the guardian ad litem must be cognizant of these ethical considerations. *See, e.g., Tamara L.P. v. County of Dane (In re Guardianship of Tamara L.P.)*, [177 Wis. 2d 770](#), [503 N.W.2d 333](#) (Ct. App. 1993) (concluding that guardian ad litem was disqualified because of previous service as advocacy counsel in [Wis. Stat.](#) ch. 51 involuntary commitment proceeding). The Wisconsin Court of Appeals referred to *Tamara L.P.* in discussing whether an attorney could simultaneously represent a ward and a family member with potential, if not actual, conflicts of interest, in *Guerrero v. Cavey (In re Guardianship & Protective Placement of Lillian P.)*, [2000 WI App 203](#), [238 Wis. 2d 449](#), [617 N.W.2d 849](#). Although *Guerrero* did not involve a conflict of interest for the guardian ad litem, the court stated that *Tamara L.P.* “recognizes that an attorney may be disqualified even if the conflict of interest has not evolved to an actual conflict, but instead remains a potential one.” *Id.* ¶ 24 n.8.

(2) Training Under SCR Ch. 36 [§ 6.9]

[Wis. Stat.](#) § 54.40(2) specifically requires that the guardian ad litem comply with [SCR](#) ch. 36. [SCR](#) ch. 36 provides that a lawyer cannot accept a guardian ad litem appointment for an adult in an action or proceeding under [Wis. Stat.](#) ch. 54 or [Wis. Stat.](#) ch. 55 unless one of three conditions is met: (1) the lawyer has attended 30 hours of approved guardian ad litem education since January 1, 1995; (2) the lawyer has attended 6 hours of approved guardian ad litem education during the current continuing legal education (CLE) reporting period combined with the immediately preceding reporting period; or (3) the appointing court makes a finding in writing or on the record that the case presents “exceptional or unusual circumstances” for which the lawyer is otherwise qualified by “experience or expertise.” By accepting an appointment as a guardian ad litem, the lawyer is representing to the court that the lawyer has met the requisite education requirements. Thus, the training requirement is self-enforced; the Board of Bar Examiners (BBE) does not issue a certificate attesting that the lawyer is a qualified guardian ad litem. Instead, the ethical burden is on the lawyer who, in accepting the appointment, represents to the court that the attorney has met the training requirement. [SCR](#) 36.02.

c. General Duties [§ 6.10]

The statutes systematically delineate the “general duties” of the guardian ad litem. [Wis. Stat.](#) § 54.40(4). These duties, discussed in greater detail in other sections of this chapter, include personally interviewing the proposed ward to explain the procedure and certain legal rights; notifying the proposed ward orally and in writing of specific legal rights; interviewing the proposed guardian, the proposed standby guardian, and any other person seeking appointment as guardian; notifying any already-existing guardian of certain legal rights; reviewing advance-planning directives and interviewing agents appointed under them; making requests or required recommendations to the court, informing the court about any objections raised by the proposed ward, and responding to court requests; and representing the best interests of the proposed ward before and during all court proceedings.

By law, the guardian ad litem has none of the rights or duties of a guardian. [Wis. Stat.](#) § 54.40(3). On occasion, however, it may be difficult to determine when advocacy duties fall into the general duties of a guardian. For example, in *Milwaukee County Protective Services Management Team v. K.S. (In re Proposed Guardianship & Protective Placement of K.S.)*, [137 Wis. 2d 570](#), [405 N.W.2d 78](#) (1987), advocacy counsel for an alleged incompetent person asserted the person's personal privilege against disclosure of medical records. From this, it could be argued that the guardian ad litem would also have the right to invoke the privilege, which is generally considered personal to the individual and, therefore, presumably the province of the guardian. *See also State v. S.H.*, [159 Wis. 2d 730](#), [465 N.W.2d 238](#) (Ct. App. 1990) (noting, in statement of facts, guardian ad litem's assertion of claim of privilege on behalf of minor children but not explicitly addressing whether guardian ad litem had authority to invoke the privilege), *overruled in part on other grounds by State v. Johnson*, [2023 WI 39](#), ¶ 1 n.3, [407 Wis. 2d 195](#), [990 N.W.2d 174](#).

2. Initial Considerations [§ 6.11]

The guardian ad litem must know the requirements of the guardianship laws (and usually also of the protective-placement laws) to ensure their procedural and substantive requirements are met.

Practice Tip. Even if familiar with the laws, the guardian ad litem may find it helpful to give [Wis. Stat.](#) ch. 54 (and possibly [Wis. Stat.](#) ch. 55 as well) a cursory review at the beginning of each case.

The guardian ad litem first reviews the initial documents for completeness. These documents are generally filed by the petitioner's attorney and include the petition, the order for hearing, the order appointing the guardian ad litem, and possibly the written statement from the examining physician if it is completed before the petition is filed. These documents are obtained by opting into the electronic court file (e-file). See generally Wis. Ct. Sys., *eFile/eCourts*, *Wisconsin's Digital Ct. Sys.*, <https://www.wicourts.gov/ecourts/index.htm> (updated Apr. 30, 2024). The contents of the initial documents assist the guardian ad litem in screening the case and anticipating the length and location of the interview with the proposed ward. From these initial documents, the guardian ad litem can learn the nature of the proposed ward's alleged disability, the size of the estate, the number and location of family members and interested persons, and general demographic information. In reviewing the initial documents, the guardian ad litem must be alert to any unusual issues, including unique medical or psychological factors. The guardian ad litem will investigate these issues further during the course of the proceedings. The contents of the initial documents also assist the guardian ad litem in determining the scope of the case and therefore the scope of the guardian ad litem's investigation. For instance, the topics the guardian ad litem covers in interviews may be different depending on whether the petitioner is seeking a guardianship of the person, a guardianship of the estate, or both.

Some counties require the guardian ad litem to sign a consent to act. See Form [GE-131B](#). Often, in those counties, the petitioner's attorney or the register in probate will upload the consent to act to the e-file for the case or send a copy to the guardian ad litem to sign. Once the guardian ad litem executes the consent to act, the guardian ad litem will upload it to the e-file or send it back to the petitioner's attorney to upload to the e-file. The guardian ad litem should understand and follow the county's procedure.

Doctors, psychologists, and other health-care professionals sometimes require the guardian ad litem to exhibit not only proof of appointment but also a court order for release of confidential information before they release information to, and discuss the case with, the guardian ad litem. In counties in which this documentation is necessary, it may be possible to include the blanket release with the order appointing the guardian ad litem by attaching the release to the order. Then, using an authenticated copy of one court order, the guardian ad litem can provide both proof of appointment and authorization for access to confidential information. Otherwise, the guardian ad litem must draft an order for release of confidential information. See *infra* § [6.57](#) (sample form).

The guardian ad litem must notify the proposed ward in writing of certain legal rights. [Wis. Stat.](#) § 54.40(4)(b); see also *infra* § [6.13](#). A convenient time to prepare this written notice is when the guardian ad litem reviews the initial documents and opens the file. Some guardians ad litem use a letter, while others use a form akin to a legal notice. See *infra* §§ [6.53–.55](#) (sample forms). The guardian ad litem may wish to tailor the notice to the overall functioning of the proposed ward. For a sample letter notice to use with a cognitively delayed adult, for example, see section [6.54](#), *infra*. The statute is quite specific about which rights must be included in the written form. Although the proposed ward has the right to have the hearing in an accessible place, [Wis. Stat.](#) § 54.42(6), this right is not included in the rights that must be provided orally and in writing under [Wis. Stat.](#) § 54.40(4)(b).

3. Interviewing Proposed Ward and Proposed, Potential, and Current Guardians [§ 6.12]

a. Proposed Ward [§ 6.13]

The guardian ad litem must interview the proposed ward and advise the proposed ward, orally and in writing, of the proposed ward's legal rights. [Wis. Stat.](#) § 54.40(4)(a), (b). Before meeting with the proposed ward, the guardian ad litem generally gathers information necessary to determine the nature of the alleged incompetency and the ways in which the proposed ward functions. When protective placement under [Wis. Stat.](#) ch. 55 is involved, the guardian ad litem may have useful information from the social worker's comprehensive evaluation. See *infra* [ch. 7](#). When a protective placement is not involved, however, the guardian ad litem in a guardianship proceeding must look to the petitioner's attorney, the petitioner, family members (listed in the petition for guardianship), the evaluating physician or psychologist, or other reliable sources. In some situations, the local department of human services may have had contact with the proposed ward, and the social worker or community outreach worker may have useful information and history. If the proposed ward is in a group home, the staff of the group home may be a potential source of information. Because this chapter deals with guardianship proceedings that do not include requests under [Wis. Stat.](#) ch. 55, it must be assumed that the proposed

ward is not in a nursing home. In protective-placement cases in which the proposed ward is in a nursing home or equivalent institution, the institutional records and staff members are important resources. The goal is for the guardian ad litem to understand why the proposed ward is considered to be incompetent and then use that information during the guardian ad litem's interview with the proposed ward to help determine whether the grounds for guardianship exist. Of course, all cases differ in complexity; the guardian ad litem uses discretion in the amount of preparation for the interview with the proposed ward based on the facts of the case.

The guardian ad litem might not have the opportunity to check with these collateral sources before the interview, or the guardian ad litem may determine after the interview that certain collateral sources must be contacted (or contacted again). Generally, the guardian ad litem makes a cursory investigation before the interview and decides, after the interview, whether additional information is necessary and realistically can be obtained.

Most collateral contacts will speak to the guardian ad litem voluntarily. Some people, generally human services workers and health-care professionals, require the guardian ad litem to exhibit a copy of the order appointing the guardian ad litem before they will agree to speak with the guardian ad litem. Increasingly, certain witnesses (usually health-care providers) require a formal release of records, signed by the assigned judge. Once the requested documentation is exhibited, however, the individuals are generally cooperative with the guardian ad litem. If an individual is not cooperative, the guardian ad litem may be able to obtain the necessary information from an alternative source. Otherwise, the guardian ad litem does have authority to undertake civil discovery, such as a deposition. Nevertheless, a deposition would be highly unusual and generally would not be accomplished before the interview with the proposed ward.

The guardian ad litem must give some thought to the time and place of the interview with the proposed ward. The guardian ad litem may need to involve family members or a social worker in making the arrangements. If the proposed ward is in a group home or living with a competent family member, the process of setting up the interview is greatly simplified. If the proposed ward is living alone, the guardian ad litem typically needs the assistance of someone the proposed ward knows to gain access to the residence. The general rule is that the guardian ad litem travels to the proposed ward, wherever the proposed ward is residing. The easiest interviews to schedule are those in a nursing home or similar facility. In a straight guardianship as contemplated in this chapter, in contrast to an action that also includes protective placement, the proposed ward would most likely not be living in an institution at the time of the initial interview. Exceptions might arise in certain uncommon situations but, in general, if the pending action is for guardianship only, not protective placement, the proposed ward is most likely not in a nursing home or other large facility that requires protective placement. For cases involving protective placement, see [chapter 7](#), *infra*.

Before the hearing, the guardian ad litem must explain to the proposed ward the contents of the petition, the hearing procedure, the right to counsel, and the right to request or continue a limited guardianship (even though "limited guardianship" is not a defined concept in the current version of [Wis. Stat.](#) ch. 54, *see infra* § [6.24](#)). [Wis. Stat.](#) § 54.40(4)(a). In addition, the guardian ad litem must notify the proposed ward, orally and in writing, of the rights "to be present at the hearing, to a jury trial, to an appeal, to counsel, and to an independent medical or psychological examination on the issue of competency, at county expense if the person is indigent." [Wis. Stat.](#) § 54.40(4)(b); *see supra* § [6.11](#); *see also infra* §§ [6.53–.55](#) (sample forms).

If the proposed ward refuses or is unable to accept the written notification, the guardian ad litem may leave the notice with the proposed ward's other personal papers and documents or in the person's vicinity. The guardian ad litem must read all the rights to the proposed ward and interview the proposed ward even if the person is apparently unaware of the process. The duties set out in [Wis. Stat.](#) § 54.40(4) are mandatory and, as standard practice, the guardian ad litem should later prepare and file a report stating that the guardian ad litem has performed the requisite duties. *See infra* § [6.25](#); Form [GN-3160](#).

The structure of the interview with the proposed ward depends on the style of the guardian ad litem and the personality and condition of the proposed ward. If the proposed ward is unable to process information, then the interview is rather mechanical. If the proposed ward is able to process information, then the interview will be tailored to the situation and may be quite free-flowing. As in any client interview, the guardian ad litem must be alert to physical impediments to communication such as the proposed ward's ability to hear, see, or screen out distractions. The guardian ad litem must respect the proposed ward's privacy and focus on the purposes of the interview: to advise the proposed ward of the hearing procedure and the statutory rights, to secure any requests from the proposed ward, and to evaluate whether the proposed ward is exhibiting characteristics that would serve as grounds for appointment of a guardian. The style of the guardian ad litem and the condition of the proposed ward combine to give focus and direction to the interview itself. Some guardians ad litem visit with the proposed ward and, after a certain comfort level is reached, inform the proposed ward of the legal rights. Other guardians ad litem inform the proposed ward of the legal rights early in the interview and then proceed to the less formal portion of the meeting.

Apart from the required notifications, the interview with the proposed ward may touch on some or all of these areas: identity of family members; family history and problems; current events; questions related to orientation (person, place, and time) or long- and short-term memory issues; and the proposed ward's financial situation, especially if a guardianship of the estate is requested. The guardian ad litem must be careful to focus on the proposed ward's ability to function and not on unusual dress or conduct that does not affect function or safety, also remembering that a person's voluntary choice of a destructive lifestyle is not sufficient to form the grounds of incompetency. *Zander v. County of Eau Claire (In re Guardianship & Protective Placement of Shaw)*, 87 Wis. 2d 503, 275 N.W.2d 143 (Ct. App. 1979); see also [Wis. Stat. § 54.10\(3\)\(b\)](#) (providing that court may not make determination of incompetency based on mere old age, eccentricity, poor judgment, or physical disability).

b. Proposed and Potential Guardians [§ 6.14]

The guardian ad litem must interview the proposed guardian; the proposed standby guardian, if any; any other person seeking appointment as guardian; and any agent under any powers of attorney (POAs) executed by the proposed ward. [Wis. Stat. § 54.40\(4\)\(c\), \(d\)](#).

The guardian ad litem must ultimately make a recommendation, or report, to the court regarding the suitability of the proposed guardian, the proposed standby guardian, and any other person seeking appointment as guardian. [Wis. Stat. § 54.40\(4\)\(c\)](#). Because suitability is not defined in the statutes, the definition will develop on a case-by-case basis.

Generally, the guardian ad litem investigates suitability by considering whether the individual can appropriately perform the duties of a guardian and whether the individual can operate within the limitations imposed by law. See generally [Wis. Stat. §§ 54.18](#) (general duties and powers of guardian; limitations; immunity), [54.19](#) (duties of guardian of the estate), [54.20](#) (powers of guardian of the estate), [54.25](#) (duties and powers of guardian of the person). During the investigation, the guardian ad litem may need to obtain information from confidential records. To do so, the guardian ad litem needs a release signed by the person whose records are involved. If records are needed for the proposed ward and the proposed ward has an agent under a health-care power of attorney (HCPOA) or a financial POA or a temporary guardian, the agent's consent might also be needed.

Note. The mandatory form for the report by the guardian ad litem, Form [GN-3160](#), requires the guardian ad litem to report as to the "suitability and fitness" of the individuals. "Fitness" is not used or defined in [Wis. Stat. ch. 54](#), and the statute does not require the guardian ad litem to investigate fitness as a separate concept. Accordingly, for the purpose of filling in Form [GN-3160](#), the guardian ad litem would equate fitness with suitability.

In addition, the guardian ad litem must report to the court "concerning" a sworn statement that each proposed guardian must submit to the court at least 96 hours before the guardianship hearing. [Wis. Stat. §§ 54.40\(4\)\(c\), 54.15\(8\)](#). This statement must disclose whether the proposed guardian is currently charged with or has been convicted of a crime under [Wis. Stat. § 939.12](#); has filed for or received protection under federal bankruptcy laws; has had a professional or occupational license (or equivalent) suspended or revoked; or is listed on the state registry for abuse, neglect, or misappropriation of property by certain personal-care assistants reported under [Wis. Stat. § 146.40\(4r\)](#), see [Wis. Stat. § 146.40\(4g\)\(a\)2](#). [Wis. Stat. § 54.15\(8\)](#); Form [GN-3140](#).

If any of the declarations in [Wis. Stat. § 54.15\(8\)\(a\)1m.a., b., c., or d.](#) apply to the proposed guardian, then the proposed guardian must also include in the statement of acts and consent to serve, see Form [GN-3140](#), a full explanation of the circumstances surrounding the event. [Wis. Stat. § 54.15\(8\)\(b\)](#). The guardian ad litem must review the statement in light of the duty to report about the suitability of the proposed guardian to serve. See [Wis. Stat. § 54.40\(4\)\(c\)](#). Thus, it seems likely that affirmative declarations about any issues covered in the sworn statement would result in a question about the suitability of the proposed guardian to serve.

The remedy for, or consequence of, a proposed guardian's failure to file this statement is not included in the statute. A hearing on a guardianship petition must be heard within strict time limits, [Wis. Stat. § 54.44\(1\)](#), so presumably the hearing will occur even if the statement is not filed. The law does provide that if a court, after hearing, finds that the proposed guardian is "unsuitable," then "the court shall request that a petition proposing a suitable guardian be filed, shall set a date for a hearing to be held within 30 days, and shall require the guardian ad litem to investigate the suitability of a new proposed guardian." [Wis. Stat. § 54.44\(6\)](#). The statute, in using the passive voice, does not identify who should file the new petition or who should find a new proposed guardian. The guardian ad litem should probably not take on this task because the guardian ad litem would not be neutral in an investigation of the suitability of a guardian who is named in a petition actually filed by the guardian ad litem.

Proposed guardians must complete training requirements set forth in [Wis. Stat. § 54.26](#). Proposed guardians must submit a statement attesting to their completion of those requirements, unless exempted. *See* [Wis. Stat. § 54.15\(8\)\(a\)2m.](#); Form [GN-3135](#). Presumably guardians ad litem will be required to report to the court “concerning” this sworn statement as well, pursuant to [Wis. Stat. § 54.40\(4\)\(c\)](#). The guardian ad litem should confirm the training has been completed before recommending the proposed guardian be appointed, or the guardian ad litem should recommend that the proposed guardian only be appointed subject to completing the training.

The guardian ad litem must also keep in mind that if the individual has an HCPOA or a financial POA, the agents under those documents should be treated as potential guardians even if not named as proposed guardians in the guardianship petition. This status is created by the statutory mandates that the court appoint an existing health-care agent as guardian of the person and an existing agent under a financial POA as guardian of the estate, unless the court finds that the appointment of the agents is not in the proposed ward’s best interests. [Wis. Stat. § 54.15\(2\), \(3\)](#). Thus, not only must the guardian ad litem assess the suitability of any proposed guardian; the guardian ad litem must also assess the suitability of the agents under the existing POAs to serve as guardians because those agents are equivalent to “proposed guardians” under the statutes. *See also infra* [§ 6.16](#).

In considering suitability, the guardian ad litem should not abandon common sense or legal training. The guardian ad litem considers the opinions of the proposed ward and members of the family, potential conflicts of interest resulting from the proposed guardian’s employment or other commitments and relationships, and the importance of prior nominations. *See* [Wis. Stat. § 54.15](#) (selection of guardian; nominations; preferences; other criteria).

The best interests of the ward are controlling in choosing the guardian over objection of members of the ward’s family. [Wis. Stat. § 54.15\(1\)](#). The guardian ad litem may become involved not only in difficult family dynamics but also in disputes with persons serving as agents of the proposed ward. The health-care agent under the HCPOA, and the agent under the financial POA, are interested persons in guardianship proceedings. [Wis. Stat. § 54.01\(17\)](#); *see also Knight v. Milwaukee Cnty. (In re Guardianship & Protective Placement of Muriel K.)*, [2002 WI 27](#), [251 Wis. 2d 10](#), [640 N.W.2d 773](#) (holding that health-care agent under HCPOA and agent under durable POA had standing to appeal finding of guardianship and to participate in guardianship proceedings); *cf. Winiarski v. Village at Manor Park (in re Guardianship of Florence T.O.)*, [2008 WI App 7](#), ¶ 12, 307 Wis. 2d 203, [744 N.W.2d 915](#). Indeed, *interested persons* is defined very broadly, and many people may have strong opinions about who is suitable, or most suitable, to serve as guardian of the estate or of the person. Frequently, everyone involved in a guardianship proceeding agrees on the need for guardianship but disagrees about who should serve as guardian.

The guardian ad litem should be particularly aware of the potential for financial, mental, or physical abuse of the proposed ward by the proposed guardian. Although most reported abuse of older adults falls under the category of “self-neglect,” the categories of financial exploitation, emotional abuse, and physical abuse are particularly salient in guardianship proceedings because most abuse and exploitation are perpetrated by families and friends. Of course, these are the people who may seek to secure their position of power by becoming the individual’s legal guardian. The most recent statistical report compiling data from reports made through the Wisconsin Adult Protective Services system can be accessed on the website of the Department of Health Services, <https://www.dhs.wisconsin.gov/aps/wraps.htm> (last revised Aug. 2, 2024). Research confirms that a significant proportion of abuse of older adults occurs as domestic violence in later life, with the same power and control dynamics present as in domestic violence against younger individuals. *See* Bonnie Brandl & Jane Raymond, *Unrecognized Elder Abuse Victims: Older Abused Women*, 6 J. of Case Mgmt. 62 (1997); Holly Ramsey-Kawnsnik, *Elder-Abuse Offenders: A Typology, Generations*, Summer 2000, at 17. The potential for harm when an abuser is named as guardian cannot be overstated. The guardian ad litem must make every effort to determine whether a proposed guardian is, or has been, a batterer or abuser. *See infra* [app. 6A](#).

The guardian ad litem must replicate the investigation into the suitability of the proposed guardian when investigating the suitability of the proposed standby guardian and any other person seeking appointment as guardian. *See* [Wis. Stat. § 54.40\(4\)\(c\)](#). The guardian ad litem must balance the need for full investigation with the reality that the guardian ad litem is not a private investigator, social worker, or FBI agent. If the proposed ward has a social worker (as may be the case if the petitioner is the county), then the social worker may provide invaluable assistance in assessing the proposed guardian. Also, if the guardianship proceedings include a request for protective placement or services, then the social worker conducting the comprehensive evaluation may be able to assist with the investigation.

c. Current Guardian [§ 6.15]

In the somewhat rare event that the individual already has a guardian, the guardian ad litem must notify the current guardian of the right to be present at and participate in the hearing, to present and cross-examine witnesses, to receive a copy of all evaluations, and to secure an independent evaluation and present a resulting report. [Wis. Stat. § 54.40\(4\)\(ds\)](#). The duty to provide notice of rights under [Wis. Stat. § 54.40\(4\)\(ds\)](#) apparently applies only in situations in which the proposed ward already has a guardian. The guardian ad litem must determine early on how to contact the current guardian and advise that person of the enumerated rights.

4. Assessing Powers of Attorney and Agents [§ 6.16]

The guardian ad litem must review all advance-planning directives and interview all agents named under them. [Wis. Stat. § 54.40\(4\)\(d\)](#). The guardian ad litem will most likely interview the health-care agent and the financial agent as part of assessing the suitability of proposed agents, because these individuals are potential guardians by law. *See* [Wis. Stat. § 54.15\(2\), \(3\)](#); *see also supra* [§ 6.14](#). The statutes further, and specifically, require the guardian ad litem to interview those agents for the separate but related purpose of assessing the efficacy of the advance planning undertaken by the proposed ward. [Wis. Stat. § 54.40\(4\)\(d\)](#). After reviewing the documents and interviewing the agents, the guardian ad litem must report to the court concerning whether the proposed ward's advance planning is adequate to preclude the need for guardianship. *Id.* The purpose of this is to alert the court that the ward has engaged in advance planning so that the court can determine whether (1) guardianship is necessary, *see* [Wis. Stat. § 54.10\(3\)\(c\)3.](#); (2) the POAs should survive the guardianship, if ordered *see* [Wis. Stat. § 54.46\(2\)\(b\), \(c\)](#); and (3) the petitioner's fees can be paid from the ward's estate, *see* [Wis. Stat. § 54.46\(3\)](#). The court must take advance-planning directives into account in making each of those decisions. *See also supra* [§ 6.14](#).

5. Reviewing Records [§ 6.17]

When the guardianship is not coupled with a protective-services or protective-placement action, it is possible that not all records will be available to the guardian ad litem. The treating physician, who may also be the evaluating physician, may have pertinent records. Further, the local department of human services may have records. The guardian ad litem need not always review outside records; sometimes the need for a guardianship is apparent. If the review is necessary, the guardian ad litem usually must present a court order allowing disclosure of the records. *See supra* [§ 6.11](#). If the guardian ad litem does not review outside records before the interview with the proposed ward, *see supra* [§ 6.13](#), the guardian ad litem may find it necessary to review the records following the interview based on case-specific questions or concerns.

If the guardianship is paired with a request for protective placement, then the court-ordered comprehensive evaluation, filed pursuant to [Wis. Stat. § 55.11](#), may incorporate useful medical information and records. *See infra* [ch. 7](#). A brief social history of the proposed ward, such as that included in the comprehensive evaluation, may also assist in identifying existing medical, psychological, or social service records and determining whether the records would be helpful to the guardian ad litem.

6. Making Requests to Court [§ 6.18]

a. Independent Medical or Psychological Evaluation [§ 6.19]

[Wis. Stat. § 54.40\(4\)\(e\)](#) explicitly requires the guardian ad litem to request that the court order additional medical, psychological, or other evaluations, if necessary. A separate section, [Wis. Stat. § 54.42\(3\)](#), permits the proposed ward “or anyone on the proposed ward's ... behalf” to secure an independent medical or psychological examination relevant to the issue of competency. The independent examination is at the proposed ward's expense unless the proposed ward is indigent, in which case the county where the petition is pending bears the expense. Taken together, these statutes permit the guardian ad litem to request the court to order an additional independent medical or psychological evaluation.

While the statutes make clear the obligation of the guardian ad litem to request additional evaluations, the statutes provide no practical guidance whatsoever as to how or when that request is to be made, or under what circumstances such a request would be appropriately granted or, for that matter, denied. Because the guardian ad litem must advise the proposed ward of the right “to an independent medical or psychological examination on the issue of competency,” presumably if the individual requests an independent evaluation, the guardian ad litem should request one on the ward's behalf. *See* [Wis. Stat. § 54.40\(4\)\(b\)](#). In some instances, depending on local practice, a guardian ad litem simply writes a letter to the court with a proposed order. In other situations, a motion and hearing may be required, although there is some question then about what type of evidence would be proffered at the hearing because the guardian ad litem is not to be a witness. *See infra* [§ 6.25](#) (reporting to court).

In summary, the statutes provide no guidance for the guardian ad litem in asking the court to order further evaluation of the proposed ward, no procedure for the court to use in considering the request, and no standard by which to measure the request. In the end, it is up to the skill of the guardian ad litem to shepherd the request for an independent medical or psychological evaluation through the county system and emerge with an appropriate written order.

Generally speaking, if the court orders an independent evaluation, the subsequent report and opinion of the expert is available to all parties. In contrast, in some situations, a proposed ward may arrange for an additional evaluation as part of a defense strategy. In this situation, adversary counsel arranges for an expert to conduct an additional evaluation that is not independent but is defense-oriented. As in any civil litigation, if the evaluation does not help the defense's case, the evaluation is not used and is not discoverable other than in exceptional circumstances. [Wis. Stat.](#) § 804.01(2)(d)2.

b. Advocacy Counsel [§ 6.20]

Because the guardian ad litem advises the proposed ward of the right to counsel, the proposed ward's request for advocacy counsel is likely to be directed to the guardian ad litem. The court must appoint advocacy counsel if the proposed ward requests counsel, the guardian ad litem or any other person states that the proposed ward is opposed to the guardianship petition, or the interests of justice require counsel for the individual. [Wis. Stat.](#) § 54.42(1). The guardian ad litem presumably has the duty to inform the court whether advocacy counsel is required under any one of these statutory mandates. If the proposed ward is indigent, and the petition for guardianship is granted, the county in which venue lies pays the cost of the appointed attorney. [Wis. Stat.](#) § 54.46(3)(b). For a discussion of the allocation of the ward's fees and costs in connection with involuntary proceedings, see *Ethelyn I.C. v. Waukesha County (In re Guardianship of Ethelyn I.C.)*, [221 Wis. 2d 109](#), [584 N.W.2d 211](#) (Ct. App. 1998), in which the court of appeals held that the circuit court properly assessed to the proposed ward the fees of her court-appointed advocate attorney. See *infra* §§ [6.43–.45](#) (paying the guardian ad litem); *supra* [ch. 1](#). If the petition for guardianship is not granted, the petitioner is liable for the fees of the proposed ward's legal counsel. [Wis. Stat.](#) § 54.46(3)(c). If the petition for guardianship is granted, the court may allow payment of fees for the ward's appointed attorney from the ward's income or assets. [Wis. Stat.](#) § 54.42(4).

Comment. Again, the statutes provide no guidance as to the procedure the guardian ad litem should use to inform the court of the need for advocacy counsel. Nor is it clear from the statutes whether a court-appointed attorney must accept the appointment, given the uncertainty of payment. A related question is whether the court must appoint an attorney acceptable to the proposed ward or specifically requested by the proposed ward. These questions are handled in each county on a case-by-case basis.

7. Anticipating Attendance Issues [§ 6.21]

Under both guardianship and protective-service-system laws, the petitioner in the proceedings must ensure that the proposed ward attends the hearing unless the guardian ad litem waives that attendance. [Wis. Stat.](#) §§ 54.44(4)(a), 55.10(2). “Attend the hearing” means being physically present at the hearing. *Racine Cnty. v. P.B. (In re Guardianship & Protective Placement of P.B.)*, [2022 WI App 62](#), ¶ 1, [405 Wis. 2d 383](#), [983 N.W.2d 721](#). A court loses competency to rule on the petition for guardianship if the ward appears remotely without the guardian ad litem's waiver of attendance. *Id.*

Under prior law, a presumption existed that the proposed ward was able to attend unless the guardian ad litem certified to the court that the person was unable to attend. [Wis. Stat.](#) §§ 880.08(1), 55.06(5) (2003–04). Those prior statutes did not provide any substantive guidance to assist the guardian ad litem in determining whether the proposed ward was unable to attend the hearing, and so, over time, traditions arose county by county that helped shape the guardian ad litem's determination.

Ultimately, the court of appeals removed most of the discretion of the guardian ad litem in *Knight v. Milwaukee County (In re Guardianship & Protective Placement of Muriel K.)*, [2002 WI App 194](#), [256 Wis. 2d 1000](#), [651 N.W.2d 890](#) (interpreting former [Wis. Stat.](#) § 880.08(1)). The court of appeals held that the circuit court would not have jurisdiction if the proposed ward were able to attend the hearing but was not present at the hearing. The court explained and underscored the vital role of the guardian ad litem in ensuring attendance and in properly certifying in writing the reasons for nonattendance under the then-existing law. The court stated that the “presumed fact” was that a proposed ward would be able to attend and that, therefore, any reasons for nonattendance certified by the guardian ad litem were required to “equal an inability to attend.” *Id.* ¶ 5. This case was a benchmark for defining the guardian ad litem's responsibilities in ensuring attendance of the proposed ward at the initial hearing. It resulted in concern, however, on the part

of counties in which the tradition had arisen that proposed wards typically did not attend uncontested guardianship proceedings, and also on the part of families who were reluctant for various reasons to subject their relatives to guardianship hearings.

[Wis. Stat.](#) ch. 54 eliminated the “presumption” that the proposed ward is able to attend the hearing, while preserving the proposed ward’s right to be present at the initial hearing (or at any hearing under the guardianship statutes). [Wis. Stat.](#) § 54.42(5). However, the statutes provide no legal standard for the guardian ad litem, or the court, to apply in determining whether the proposed ward’s attendance may be excused. By removing the presumption, the revised statutes, as codified at [Wis. Stat.](#) ch. 54, removed the underpinning for the holding in the *Muriel K.* case, and it appears that “inability to attend” is no longer the legal standard.

[Wis. Stat.](#) ch. 54 does, however, provide the guardian ad litem with three factors to consider in determining whether the guardian ad litem should waive the proposed ward’s attendance: the ability of the proposed ward to understand and meaningfully participate, the effect of the proposed ward’s attendance on the proposed ward’s physical or psychological health in relation to the importance of the proceeding, and the proposed ward’s expressed desires. [Wis. Stat.](#) § 54.44(4)(a). The statute then echoes the former statute, *see* [Wis. Stat.](#) § 880.08(1) (2003–04), by providing that if the proposed ward is “unable” to attend the hearing because of lack of transportation, or because of residence in a nursing home or other facility, the court must hold the hearing in a place where the proposed ward may attend, if requested by the proposed ward, guardian ad litem, advocacy counsel, or other interested person. [Wis. Stat.](#) § 54.44(4)(a).

In *Muriel K.*, the court found that the reasons proffered by the guardian ad litem—that the proposed ward did not wish to attend the hearing and that the hearing would have been upsetting to her—did not meet the test of the ward being “unable” to attend the hearing. These same reasons, under the current statutes, would very likely be sufficient for the guardian ad litem to decide to waive the attendance of the proposed ward. Indeed, Wisconsin may be headed back to the days when county tradition and family preference combined to pressure the guardian ad litem to waive the proposed ward’s attendance.

Although guardianship may be a relatively simple court proceeding, its effect is to remove, or to potentially remove, almost all of a person’s legal rights. Given the magnitude of the proceedings, the proposed ward should attend if at all possible. A suggested informal guideline is that if the proposed ward travels for any reason (trips to the doctor, to a restaurant, or to the hairdresser, for example), the person should be able to travel to the court hearing. If the proposed ward does not travel, the guardian ad litem must then determine why. A proposed ward who has not traveled because of lack of opportunity probably can attend the hearing. On the other hand, a person on life-support systems is manifestly unable to travel to a courthouse. Most cases fall somewhere between these extremes; the guardian ad litem must use sound discretion in determining whether attendance can be excused.

[Wis. Stat.](#) § 54.44(4) is not clear as to whether the waiver by the guardian ad litem is binding on the court. The statute does not provide what happens if the guardian ad litem waives the appearance inappropriately or over the objection of an interested person. The guardianship statute also does not, on its face, require that the waiver be in writing, but a parallel waiver in a protective-placement case must be in writing. [Wis. Stat.](#) § 55.10(2).

In *Dane County Department of Human Services v. Daniel L.C. (In re Guardianship & Protective Placement of Daniel L.C.)*, No. [2012AP400-FT](#), 2012 WL 3205574 (Wis. Ct. App. Aug. 9, 2012) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), the court of appeals confirmed that the guardian ad litem’s waiver of the proposed ward’s attendance in a guardianship action need not be in writing, but that the waiver in a protective-placement action is ineffective unless in writing.

If the guardian ad litem does not excuse the attendance of the proposed ward, the guardian ad litem should confirm that the petitioner has arranged for the ward’s transportation. The transportation may present a financial problem in some cases because insurance might not cover its cost. Although the guardian ad litem is not legally prohibited from transporting the ward to the hearing, the guardian ad litem is not expected to do so, and, because of malpractice and liability concerns, should probably not do so.

8. Considering the Type and Extent of Guardianship [§ 6.22]

a. Type of Guardianship [§ 6.23]

As the investigation continues, the guardian ad litem must reach a threshold decision about whether the proposed ward needs a guardianship at all. To make this decision, the guardian ad litem must be familiar with the standards for guardianship and the

alternatives available. As part of that determination, the guardian ad litem considers the type of guardianship that would fit the situation: whether the guardianship should be of the person, the estate, or both.

If a durable financial POA or conservatorship exists, without any problems, then the proposed ward most likely does not need a guardianship of the estate. If the individual's HCPOA is activated, but the proposed ward is without a durable financial POA, then perhaps only a guardianship of the estate would be necessary. If the case involves very few assets, a guardianship of the estate may be superfluous or it still may be needed if the individual needs a guardian of the estate to apply for benefits such as Medicaid long-term care.

To complicate matters somewhat, the proposed ward's prior execution of the HCPOA does not necessarily mean that a guardianship of the person is unnecessary. The proposed ward may have limited the powers of the health-care agent, or the document may not include an admission-to-nursing-home authorization. The situation can also arise in which a person who was admitted to a nursing home under an activated HCPOA begins to protest the placement, triggering the need for protective placement and the required underlying guardianship. In those situations, a guardianship may be necessary, but a guardianship of the person might be limited to allow the health-care agent to continue to serve in that capacity. HCPOAs and durable financial POAs remain in effect after creation of a guardianship unless good cause is shown to revoke or limit them. [Wis. Stat.](#) § 54.46(2)(b), (c). The dichotomy of a guardianship of the person and an HCPOA can be a meaningful one because the guardian of the person must act in the person's best interests, *see* [Wis. Stat.](#) § 54.25(1), while the health-care agent must take actions consistent with the decisions or directives of the principal. [Wis. Stat.](#) § 155.20(5). Only if no specific directive is made, or if the principal's desires are unknown, does the health-care agent make an independent determination of *best interests*. *See also supra* § 6.16.

b. Extent of Guardianship [§ 6.24]

After the guardian ad litem is satisfied with the initial choice of the type of guardianship—person or estate—the guardian ad litem must then be satisfied as to the extent of the guardianship. The guardian ad litem must understand the importance of fashioning the guardianship to the situation.

The statutes are exhaustive and explicit in the way in which a guardianship is crafted. The historical concepts of “full guardianship” and “limited guardianship” are no longer material under [Wis. Stat.](#) ch. 54. In general, the guardianship statutes carefully define all terms, *see generally* [Wis. Stat.](#) § 54.01, and allow for appointment of a guardian of the person or estate only if no other means exist to protect the individual. [Wis. Stat.](#) § 54.10(3)(a)4. For purposes of a guardianship of the person, the individual must be unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for physical health and safety. [Wis. Stat.](#) § 54.10(3)(a)2. For purposes of a guardianship of the estate, the individual must be unable to effectively receive and evaluate information or to make or communicate decisions related to the management of the individual's property or financial affairs. [Wis. Stat.](#) § 54.10(3)(a)3. In addition, to meet the standards for a guardianship of the estate, one of the following must also apply: the individual has property that will be dissipated, the individual cannot provide for the individual's support, or the individual is unable to prevent financial exploitation. *Id.*

The statutes set up a general standard for all guardians, [Wis. Stat.](#) § 54.18, and then set out separate standards for guardians of the estate, [Wis. Stat.](#) §§ 54.19–.22, and for guardians of the person, [Wis. Stat.](#) § 54.25. The underlying policy is that the ward retains all rights unless specifically removed through the guardianship. [Wis. Stat.](#) §§ 54.18(1), 54.25(2). The law is designed to be case-specific and to require that the guardianship be as limited in scope as possible.

Particularly in the area of guardianship of the person, the guardian ad litem must be cognizant of the functional ability of the proposed ward so that the guardian ad litem can evaluate and make recommendations concerning the “evaluative capacity,” [Wis. Stat.](#) § 54.25(2)(d), of the proposed ward to exercise certain legal rights. The statutory provisions setting up the possible permutations of a guardianship of the person are complicated and not particularly intuitive. Three separate types of rights are separately considered and given different treatment. One group of rights is retained by the ward regardless of capacity; they are never lost even if the ward is functionally unable to exercise them. These “forever” rights are enumerated in seven detailed paragraphs and include rights to access and communicate with courts and governmental agencies; to retain and meet with a lawyer; to challenge guardianship, protective placement, and protective services; and to exercise the constitutional rights to free speech and free exercise of religion. [Wis. Stat.](#) § 54.25(2)(b).

A second group of rights consists of those that the court can remove from the proposed ward and transfer to the court-appointed guardian. These include the rights to make most of the decisions affecting the ward's health, welfare, residence, and finances. [Wis.](#)

[Stat.](#) § 54.25(2)(a), (d).

The third group of rights includes those that the guardianship order can remove from the ward but that are not transferred to the court-appointed guardian. These include the rights to consent to marriage; to execute a will; to serve on a jury; to apply for and hold various state licenses; to consent to sterilization; to consent to organ, tissue, or bone marrow donation; and to vote. [Wis. Stat.](#) § 54.25(2)(c)1. The ward retains each of these rights unless the court removes them. While the guardian is not permitted to exercise any of the rights so removed, the court can order that a ward retain the right to exercise certain of these rights, as enumerated, with the approval of the guardian. [Wis. Stat.](#) § 54.25(2)(c)3.

The guardian ad litem must be familiar with these categories of rights and attempt to gather evidence to determine whether the proposed ward has the evaluative capacity to exercise particular rights. Although the statutes are very clear in delineating the rights of the proposed ward, the statutes are noticeably silent about what functional abilities the proposed ward must possess to exercise those particular rights. It seems unlikely that the Wisconsin Legislature expects the participants to hire expert witnesses in all cases to parse out what abilities the ward possesses and match those to specific rights. Realistically, the guardian ad litem cannot be expected to gather evidence relating to every right identified in the statutes. At the same time, the guardian ad litem cannot be a witness, *see infra* § 6.25, and therefore has no authority to voice an opinion about what rights the proposed ward should lose unless that opinion is backed by evidence.

When considering the rights that an adult proposed ward may be able to exercise, the guardian ad litem should keep in mind that some individuals may be able to make knowing and voluntary decisions if they have trusted advisors who can help them process the choices and express those choices. For this reason, the guardian ad litem should be familiar with supported decision-making agreements and should intentionally consider how these might affect the need for a full guardianship. *See* [Wis. Stat.](#) ch. 52.

In determining the scope of a guardianship of the estate, the considerations may be somewhat less complex because the capacity of the individual to understand and manage assets may be easier to ascertain or define. Nonetheless, the guardian ad litem should be alert to the capacity of the individual to make decisions, keeping in mind that the guardian must “provide a ward with the greatest amount of independence and self-determination with respect to property management in light of the ward’s functional level, understanding, and appreciation of [the ward’s] functional limitations and the ward’s personal wishes and preferences with regard to managing the activities of daily living.” [Wis. Stat.](#) § 54.19.

In addition, the guardian ad litem must keep in mind that a guardianship may be imposed only when the court determines that no less restrictive means exist to meet the individual’s need for assistance. [Wis. Stat.](#) § 54.10(3)(a)4. The court, and presumably the guardian ad litem, must consider other means, such as “appropriate and reasonably available training, education, support services, health care, assistive devices, a supported decision-making agreement under [[Wis. Stat.](#)] ch. 52, or other means that the individual will accept.” *Id.*

In working through a file, the guardian ad litem must understand the functional capability of the proposed ward and the alternatives that might overcome the need for guardianship, as well as the specific standards for appointing a guardian of the person, [Wis. Stat.](#) § 54.10(3)(a)2., and of the estate, [Wis. Stat.](#) § 54.10(3)(a)3. At the same time, the guardian ad litem must be realistic in evaluating the situation of the ward and the ward’s family. Repeated forays into court are not in anyone’s interests, so it is important to craft the guardianship (if there is to be one) in a way that is sufficiently expansive to protect the ward but sufficiently limited to promote the ward’s autonomy.

The petitioner must prove the allegations of the petition by clear and convincing evidence. [Wis. Stat.](#) §§ 54.10(3)(a), 54.44(2). If the petitioner falls short in proving that a particular right should be removed from the proposed ward, then that right is retained by the proposed ward. If the guardian ad litem has reached a conclusion that the best interests of the individual do not necessarily require a particular provision in the guardianship, then the guardian ad litem would have no duty to advocate for including that provision. When making recommendations regarding the proposed ward’s rights, the guardian ad litem’s conclusion must be based on admissible evidence, not only the guardian ad litem’s own determination.

9. Reporting to Court [§ 6.25]

At some point, the guardian ad litem prepares a written report to submit to the court using Form [GN-3160](#). In some counties, the guardian ad litem completes and files the report before the hearing. In other counties, the guardian ad litem brings the report to the

hearing itself. The current statutes require that the guardian ad litem attend all court proceedings related to the guardianship, *see* [Wis. Stat. § 54.40\(4\)\(h\)](#), so filing a report will not dispense with the need for the guardian ad litem's presence at the hearing.

Although the guardian ad litem cannot modify the mandatory form, the guardian ad litem may supplement that form with an attachment. This may be necessary, particularly in situations involving both guardianship and protective placement.

If certain boxes on the mandatory form for the court report are irrelevant to the proceedings, the guardian ad litem may presumably choose to skip them altogether. The guardian ad litem must use the form but need not check every box on that form. The comments to the form from the Record Management Committee note that if the guardian ad litem is "unable" to complete any of the required duties, then the guardian ad litem should make note of this in the "[a]dditional comments" section of the form. *See* Form GN-3160.

The guardian ad litem's written report specifically addresses the issue of attendance, extent of guardianship, and appropriateness of the proposed guardian and standby guardian. It also confirms that the guardian ad litem has completed the required statutory duties.

The statutes also require the guardian ad litem to make other more specific reports and requests to the court. The guardian ad litem must report to the court whether the proposed ward's advance planning is adequate to preclude the need for guardianship, [Wis. Stat. § 54.40\(4\)\(d\)3.](#); inform the court if the proposed ward requests representation by counsel, [Wis. Stat. § 54.40\(4\)\(g\)](#); request that the court order additional medical, psychological, or other evaluation, if necessary, [Wis. Stat. § 54.40\(4\)\(e\)](#); if applicable, inform the court that the proposed ward objects to a finding of incompetency, the present or proposed placement, or the recommendation of the guardian ad litem as to the proposed ward's best interests, or that the proposed ward's position on these matters is ambiguous, [Wis. Stat. § 54.40\(4\)\(f\)](#); and report to the court on any matter that the court requests, [Wis. Stat. § 54.40\(4\)\(j\)](#).

Comment. The meaning of [Wis. Stat. § 54.40\(4\)\(f\)](#) is unclear both in the abstract and in practice. In general, however, a guardian ad litem would be safe in advising the court if the proposed ward objects to a finding of incompetency clearly or by implication. If the proposed ward makes no objection, but also does not express agreement, the guardian ad litem probably would not need to report this to the court, even if *no response* by the proposed ward might technically be considered *ambiguous*.

In most cases in which an additional report to the court is necessary, the statutes specifically require that the guardian ad litem also provide the information to the petitioner or petitioner's counsel, if any. *See, e.g.,* [Wis. Stat. § 54.40\(4\)\(f\), \(g\)](#); *cf.* [SCR 20:3.5](#).

Some of these requests and reports will have been made by the guardian ad litem long before the guardian ad litem prepares the final written report. Others are included in the report either because the item is not urgent or because the item is irrelevant but included as an item on the mandatory form. If the guardian ad litem has already made written reports or requests to the court, the guardian ad litem need not repeat those items in the final report.

It is important to keep in mind that, in theory, the guardian ad litem is an advocate, not a witness. *See* [SCR 20:3.7](#). The role of the guardian ad litem as advocate, not witness, is discussed in the family law context in *Wiederholt v. Fischer*, [169 Wis. 2d 524, 485 N.W.2d 442](#) (Ct. App. 1992), and *Hollister v. Hollister*, [173 Wis. 2d 413, 496 N.W.2d 642](#) (Ct. App. 1992). *See also* *Andrew J.N. v. Wendy L.D. (In re Paternity of Stephanie R.N.)*, [174 Wis. 2d 745, 498 N.W.2d 235](#) (1993), which reiterates that the guardian ad litem's oral advocacy must be supported by evidence. Together, tradition and the requirements of law have led to a practice in which the guardian ad litem files a mandatory, conclusory report with the court. Because the lawyer cannot be a witness, the report probably is not evidence and the guardian ad litem may be called upon to support the conclusions in the report with admissible evidence at the time of the final hearing. On the other hand, the statutes provide that the guardian ad litem shall "[r]eport to the court on any matter that the court requests." [Wis. Stat. § 54.40\(4\)\(j\)](#). From this, it may be inferred that the unsubstantiated statements of the guardian ad litem may be received and used by the court. Each county has its own traditions in this regard, notwithstanding the requirements of the code of professional conduct for attorneys that a lawyer not serve as a witness and an advocate in the same proceeding.

Comment. In reading through the duties of the guardian ad litem in [Wis. Stat. ch. 54](#), one might ask why the statutes require particular, and down-to-the-detail, actions by the guardian ad litem. For instance, and in contrast, the statute does not require the petitioner's attorney to read the advance directives and report as to why the petitioner's attorney has determined that the advance directives are inadequate to preclude the need for guardianship. Why, then, is it the duty of the guardian ad litem to take this particular action? *See* [Wis. Stat. § 54.40\(4\)\(d\)](#). The drafters of the statute may have concluded that every case involves a guardian ad litem but not every case involves a petitioner's attorney. Or they may have concluded that a court-appointed guardian ad litem is more easily regulated than a privately retained attorney. Or they may have concluded that guardians ad litem are not adequately

representing the best interests of proposed wards and they wanted to define what would constitute adequate representation. Whatever the reason, both [Wis. Stat.](#) ch. 54 and [Wis. Stat.](#) ch. 55 are replete with instances in which the guardian ad litem's discretion to act in certain ways is completely removed and in which the guardian ad litem must take certain actions regardless of the reasonableness, efficiency, or efficacy of the action. See, for example, [Wis. Stat.](#) § 54.40(4), listing 11 separate paragraphs of mandatory duties of every guardian ad litem in every guardianship case. The court-appointed guardian ad litem must be aware that the professional discretion involved in how to represent the best interests of a ward has been greatly limited in the statutes.

In addition, to date, the appellate courts have not considered the various reporting and certification requirements for the guardian ad litem under [Wis. Stat.](#) ch. 54—see, e.g., [Wis. Stat.](#) §§ 54.40(4)(d) (“[r]eport to the court concerning whether or not the proposed ward’s advance planning is adequate”), (j) (“[r]eport to the court on any matter that the court requests”), 55.44(4) (providing that guardian ad litem can waive attendance of proposed ward)—as being in violation of [SCR](#) 20:3.7 (lawyer as witness). Whatever the terms of the guardianship statutes, however, all guardian ad litem reports should be based on admissible evidence and couched in terms of what the evidence will, or would, show. The mandatory Wisconsin circuit court forms have not yet reflected these ethics-related concerns.

10. Representing Proposed Ward at Hearing [§ 6.26]

a. In General [§ 6.27]

After the guardian ad litem has completed the investigation and complied with the statutory requirements, and assuming that neither the proposed ward nor anyone on the proposed ward’s behalf has raised any objection to the petition, the guardian ad litem must decide whether to contest the petition independently. If the matter is not contested, then the guardian ad litem prepares for an uncontested hearing.

b. Uncontested Hearing [§ 6.28]

(1) Preparing [§ 6.29]

The guardian ad litem’s preparation for an uncontested hearing consists of (1) confirming that the petitioner’s attorney met all the necessary requirements; (2) confirming that transportation of the proposed ward is arranged, *see supra* § [6.21](#); and (3) preparing the report for the court, *see supra* § [6.25](#). At the hearing, the guardian ad litem must ensure that the presentation of the testimony and evidence is consistent with the requirements of the statutes and local court rules.

(2) Participating in Hearing [§ 6.30]

The guardianship statutes do not contemplate any situation in which the guardian ad litem would *not* appear at the hearing. [Wis. Stat.](#) § 54.40(4)(h). If the guardian ad litem is working in a county in which the guardian ad litem is not expected to attend uncontested hearings, the guardian ad litem should probably ignore that expectation and attend anyway. (In contrast, if the hearing is for protective placement only, then the guardian ad litem may be excused from the hearing if the guardian ad litem files a written report ahead of time. [Wis. Stat.](#) § 55.10(4)(b).)

At an uncontested hearing, the guardian ad litem participates largely by making certain that the petitioner’s attorney presents the necessary evidence to the court. Quite often, the petitioner’s attorney presents no evidence other than the sworn petition and the filed report of the physician or psychologist. The petitioner’s attorney may have the petitioner testify briefly. The guardian ad litem should be prepared to file the final written report, if not filed ahead of time, and to give a brief oral report. The guardian ad litem should also review the final documents prepared and filed by the petitioner’s attorney. In the end, the guardian ad litem must ensure that the checked boxes on the Determination and Order on Petition for Guardianship Due to Incompetency (Form [GN-3170](#)) are the same as the checked boxes on the Petition for Guardianship Due to Incompetency (Form [GN-3100](#)), the Examining Physician’s or Psychologist’s Report (Form [GN-3130](#)), and the Report of the Guardian ad Litem (Form [GN-3160](#)). Any discrepancy among the forms must be resolved at the final hearing. The guardian ad litem must be particularly vigilant in ensuring that any boxes that are unchecked on the Physician’s Report are also unchecked on the Determination and Order unless additional evidence was offered during the hearing to justify the court’s action in going beyond what the examining expert recommended.

(3) Checklist: Duties of Guardian ad Litem in Uncontested Guardianship Proceedings (ELD-0042) [§ 6.31]

Checklist: Duties of Guardian ad Litem in Uncontested Guardianship Proceedings

- ☐ Review statutes.
- ☐ Review initial documents and set up the file.
- ☐ Sign consent to act as guardian ad litem, if applicable (*see* Form [GF-131B](#)).
- ☐ Draft written notice of the legal rights of the proposed ward. *See infra* §§ [6.53–.55](#) (sample forms).
- ☐ Interview the proposed ward and advise of rights.
- ☐ Follow up as necessary with medical, psychological, and social service evaluators.
- ☐ Determine whether any formal court requests are necessary.
- ☐ Confer with and assess proposed and potential guardians.
- ☐ Confirm that Statements of Acts by Proposed Guardian and Consent to Serve (Form [GN-3145](#)) and Confirmation of Completion of Guardian Training Program (Adult Guardianship) (Form [GN-3135](#)) are filed by proposed and potential guardians.
- ☐ Review advance directives and interview named agents.
- ☐ Review medical, psychological, and social service evaluations.
- ☐ Conduct whatever additional investigation may be necessary.
- ☐ Consider type and extent of guardianship and “least restrictive means.”
- ☐ Determine whether proposed ward is able to attend the hearing and confirm that travel arrangements have been made.
- ☐ Ensure that petition for guardianship, report of physician, and proposed order (if available) are consistent, and follow up on any inconsistency.
- ☐ Prepare report (Form [GN-3160](#)).
- ☐ Attend hearing and file the report.
- ☐ Submit bill according to county policy.
- ☐ Close file and index for future retrieval.

c. Contested Hearing [§ 6.32]

(1) Preparing [§ 6.33]

The guardian ad litem’s preparation for a contested hearing depends on the nature of the contest and the preparations of the petitioner and the proposed ward’s advocacy counsel (if any). Although the guardian ad litem may be adverse in whole or in part to the competing participants in the case, the responsibility to subpoena witnesses and to put in a case will be affected by the activities of the other attorneys. For example, if the petitioner’s attorney is issuing a subpoena for the family doctor to testify, it may be unnecessary for the guardian ad litem to do likewise. When possible, careful coordination of witnesses and exhibits benefits the parties, the court, and the attorneys. If the guardian ad litem has decided to contest the guardianship, the guardian ad litem must make any necessary requests to the court (if not already made) and begin to prepare for trial.

It is common in some counties for witnesses, especially medical professionals, to testify remotely. If the guardian ad litem plans to call a witness virtually, a Request to Appear Remotely (Form [GF-306](#)) and proposed Order on Request to Appear Remotely (Form [GF-307](#)) should be filed within the deadline set by the local rules of the county of venue.

(2) Participating [§ 6.34]

In contested cases, the guardian ad litem has the same duties as in uncontested cases, set out in sections [6.28–.31](#), *supra*, but has additional responsibilities related to trying a contested civil action. When the proceedings are contested, the proposed ward is typically represented by advocacy counsel as well as by the guardian ad litem. Throughout the proceedings, the guardian ad litem

continues to participate as advocate for the best interests of the proposed ward. See [Wis. Stat. § 54.40\(3\)](#). In doing so, the guardian ad litem must not impede the actions of advocacy counsel.

Comment. For a discussion of the interplay of a guardian ad litem and advocacy counsel in a children’s court context, see *E.H. v. Milwaukee County (In the Interest of T.L.)*, [151 Wis. 2d 725](#), [445 N.W.2d 729](#) (Ct. App. 1988). See also *Jennifer M. v. Maurer (In re Guardianship of Jennifer M.)*, [2010 WI App 8](#), 323 Wis. 2d 126, [779 N.W.2d 436](#), for a discussion of how the guardian ad litem and the advocacy counsel interrelate in post-appointment proceedings. In *Jennifer M.*, the court of appeals held that the ward’s right to counsel under [Wis. Stat. § 54.42\(1\)\(b\)](#) includes the ward’s right to have counsel present during an interview with the guardian ad litem. Although this was a post-appointment case, the same considerations would presumably apply in initial proceedings.

Once the guardian ad litem determines which outcome would be in the proposed ward’s best interests, the guardian ad litem must present that case in court. At the hearing, the petitioner’s attorney presents the petitioner’s case, after which the advocacy counsel presents the proposed ward’s defense. By tradition, often the guardian ad litem presents the best-interests case last, even if generally aligned with either the petitioner or the defense.

The guardian ad litem need not follow the desires of the proposed ward. [SCR 20:4.5](#) specifically provides that the guardian ad litem represents and must act in the best interests of the individual, even if doing so is contrary to the individual’s wishes. On most issues, the guardian ad litem has the right to determine what is in the best interests of the proposed ward and then advocate for that position. If this position is different from that expressed by the proposed ward, it is likely that advocacy counsel would, and should, be appointed. See [Wis. Stat. § 54.40\(4\)\(f\)](#). Because the guardian ad litem represents best interests, compromise and settlement are possible because the guardian ad litem can propose a settlement even if the ward does not like or understand it.

The guardian ad litem generally relies on the witnesses called by the other attorneys at the hearing. However, as advocate for the proposed ward’s best interests, the guardian ad litem must evaluate whether reliance on other participants’ witnesses is warranted in the case. The guardian ad litem must not base the court report on any fact not in evidence at the time of trial.

Note. See a parallel discussion regarding the duties of the guardian ad litem (in family court actions) in *Hollister v. Hollister*, [173 Wis. 2d 413](#), 417–21, [496 N.W.2d 642](#) (Ct. App. 1992).

Therefore, the guardian ad litem must be aware of the facts underlying the best-interests case and of the way those facts will be introduced into evidence at trial. Often, the guardian ad litem will advocate for limitations in the scope of the guardianship. In those cases, the guardian ad litem may want to bring in testimony establishing not only the capabilities of the proposed ward but also the types of abilities necessary for the reasonable exercise of the legal rights the proposed ward may retain.

The guardian ad litem must represent the best interests of the proposed ward at all times. If alternatives to guardianship are workable, it is likely that those alternatives are in the proposed ward’s best interests.

C. Appeals [§ 6.35]

After entry of the order for guardianship, or for guardianship and protective placement, any party may initiate an appeal in the same manner as in any other civil case. See [Wis. Stat. §§ 54.40\(4\)\(b\)](#) (providing that guardian ad litem must advise ward of right to appeal), [54.40\(6\)](#) (allowing guardian ad litem to initiate or participate in appeal), [55.20](#) (“An appeal may be taken to the court of appeals from a final judgment or final order under this chapter ... by the subject of the petition or the individual’s guardian, by any petitioner, or by the representative of the public.”). An agent under health-care and financial POA documents also has standing to appeal a guardianship decision affecting the principal. *Knight v. Milwaukee Cnty. (In re Guardianship & Protective Placement of Muriel K.)*, [2002 WI 27](#), [251 Wis. 2d 10](#), [640 N.W.2d 773](#). If the advocacy counsel appointed by the court is a state public defender, an attorney from the appellate division of the State Public Defender’s Office would typically work on the appeal. If the advocacy counsel is not a public defender but a privately hired attorney, the appellate counsel will likely be the same attorney as the initially appointed advocacy counsel.

If a party initiates an appeal and the guardian ad litem chooses not to participate in that appeal, the guardian ad litem “shall file with the appellate court a statement of reasons for not participating.” [Wis. Stat. § 54.40\(6\)](#). However, the appellate court may still order the guardian ad litem to participate. *Id.*

A discussion of appellate court practice is beyond the scope of this book. For more comprehensive information on appeals, see Michael S. Heffernan, [Appellate Practice and Procedure in Wisconsin](#) (State Bar of Wis. 9th ed. 2022 & Supp.).

D. Temporary Guardianships [§ 6.36]

1. In General [§ 6.37]

On occasion, the need for a guardianship arises suddenly. For example, a person may have a stroke or other type of sudden injury or illness. Or it may be discovered that a person is experiencing, or is at extreme risk of experiencing, immediate financial or physical harm. In these and other emergency situations, a petitioner may start a temporary guardianship to obtain relief more quickly. A guardian ad litem is always appointed in these proceedings. [Wis. Stat.](#) § 54.50(3)(b).

2. Initial Considerations [§ 6.38]

To understand the overall scheme of the temporary guardianship system, the guardian ad litem should thoroughly review [Wis. Stat.](#) § 54.50, with particular attention to the appointment procedure provisions in [Wis. Stat.](#) § 54.50(3). Although the statute sets forth the responsibilities in a way that seems clear on first reading, applying the statute is somewhat difficult.

A temporary guardianship is often sought in a crisis, with the hearing scheduled quickly. If the petitioner has shown good cause, the hearing can be held at any time; absent a good-cause finding, the hearing cannot be held earlier than 48 hours after the filing of the petition. [Wis. Stat.](#) § 54.50(3)(c). Either way, the guardian ad litem typically must prepare very quickly. If time permits, the guardian ad litem should review the initial documents (most likely obtained by opting into the e-file), attempt to meet with the proposed ward, and discuss the situation with the petitioner.

3. Before the Hearing [§ 6.39]

The guardian ad litem must “attempt to meet with the proposed ward before the hearing or as soon as is practicable after the hearing, but not later than 7 calendar days after the hearing.” [Wis. Stat.](#) § 54.50(3)(b).

Comment. The purpose and placement of the word “attempt” render this sentence somewhat ambiguous. The drafters could have said, “the guardian ad litem shall meet with the proposed ward before the hearing or within 7 calendar days after the hearing.” Instead, the drafters focus on “attempt” instead of “meet,” and the result is confusion about whether the attempt itself must be made at a time certain. What is clear is that the guardian ad litem must meet with the individual; whether the guardian ad litem must “attempt” to meet with the individual before the hearing is unclear.

If the guardian ad litem is unable to attend the scheduled hearing, then the guardian ad litem must file a written report “concerning the proposed ward.” [Wis. Stat.](#) § 54.50(3)(c). Accordingly, before the hearing, the guardian ad litem must do whatever investigation is necessary to write that report. The statutes provide no further guidance about what should be contained in that report, and no case law has yet interpreted the statute. Whatever the contents of the report, the guardian ad litem should file it before the hearing and serve it on the petitioner and any interested persons.

Note. This report is not the same as the report as to the advisability of the guardianship, discussed in section [6.41](#), *infra*. Also, this report is not required if the guardian ad litem attends the hearing either in person or remotely.

4. At the Hearing [§ 6.40]

[Wis. Stat.](#) § 54.50 is silent about attendance at the hearing by the proposed ward. [Wis. Stat.](#) § 54.42(5), part of the general statute enumerating the rights of a proposed ward, provides that the proposed ward “has the right to be present at any hearing regarding the guardianship.” To date, no court decisions have applied this general statute to temporary guardianship proceedings.

The role of the guardian ad litem at the temporary guardianship hearing is somewhat vague, particularly if the guardian ad litem has not yet met with the proposed ward. The only mandated action of the guardian ad litem is to report to the court on the advisability

of the temporary guardianship at the hearing or not later than 10 calendar days after the hearing. [Wis. Stat.](#) § 54.50(3)(b). A holistic reading of [Wis. Stat.](#) § 54.50 suggests that the guardian ad litem may report on the “advisability” of the temporary guardianship at the hearing if the guardian ad litem has met with the ward before the hearing. The statute does not require that the report be in writing. If the guardian ad litem has not met with the proposed ward before the hearing, then the guardian ad litem would not report to the court on the advisability of the guardianship until after meeting the proposed ward.

Comment. In some counties, the court will request that the guardian ad litem waive the proposed ward’s appearance at a temporary hearing. The request is difficult for a guardian ad litem to respond to for several reasons. [Wis. Stat.](#) ch. 54 does not anticipate the guardian ad litem waiving the proposed ward’s appearance at a temporary hearing as it does at a hearing on permanent guardianship. Compare [Wis. Stat.](#) § 54.44(4)(a), with [Wis. Stat.](#) § 54.50(3)(c). For a temporary petition, the petitioner shall “serve notice of the order for hearing on the proposed ward before the hearing or not later than 3 calendar days after the hearing.” [Wis. Stat.](#) § 54.38(6). This indicates that the proposed ward’s presence is not mandated at the temporary guardianship hearing. It is unclear how a guardian ad litem could waive the proposed ward’s appearance at a temporary guardianship hearing, when the ward’s appearance is not statutorily required and the ward might not receive notice of the hearing until after it has occurred. Moreover, often the guardian ad litem has not met with the proposed ward before the temporary hearing and has little information regarding the matter. Therefore, the guardian ad litem would be hard pressed to justify a waiver of appearance under the standards set forth in [Wis. Stat.](#) § 54.44(4)(a).

5. After the Hearing [§ 6.41]

If the guardian ad litem is unable to meet with the proposed ward before the hearing, then the guardian ad litem must meet with the individual not later than seven calendar days after the hearing. [Wis. Stat.](#) § 54.50(3)(b).

Comment. It would seem axiomatic that if the court dismisses the temporary guardianship petition at the hearing, the guardian ad litem would be excused from the duty to meet with the no-longer-proposed ward.

The statute does not require the guardian ad litem to discuss any particular matters with the individual. Generally, the guardian ad litem will explain the temporary guardianship process and advise the ward that the ward can request a rehearing on the petition.

Practice Tip. It may also be good practice, although not required by [Wis. Stat.](#) § 54.50, to indicate whether the ward objects to the temporary guardianship. See *infra* § 6.56 (Form: Report of Guardian ad Litem (Temporary Guardianship)).

Practice Tip. If the permanent guardianship hearing is scheduled before the guardian ad litem’s meeting with the proposed ward, the meeting can serve as both the meeting to address the temporary guardianship and the meeting to review the permanent guardianship petition and the proposed ward’s rights pertaining to the permanent guardianship.

The guardian ad litem must report to the court on the advisability of the temporary guardianship at the hearing or not later than 10 calendar days after the hearing. If the guardian ad litem did not meet with the proposed ward before the hearing, then the guardian ad litem cannot make the report during the hearing itself. Accordingly, the guardian ad litem must meet with the ward after the hearing (see the discussion above in this section) and then, within 10 calendar days after the date of the hearing, the guardian ad litem must file the requisite report. [Wis. Stat.](#) § 54.50(3)(b). Again, the statute assumes that the court granted the petition.

The report must be in writing, not because the statute requires a written report but because, unless a rehearing is scheduled, there is no other way to convey a “report” to the court. The statute requires only that the guardian ad litem report “on the advisability of the temporary guardianship.” *Id.*

If the guardian ad litem meets with the proposed ward before the court hearing, then the guardian ad litem can report to the court on the advisability of the temporary guardianship at the hearing, and a subsequent written report is unnecessary.

6. Reporting Duties: Summary Flow Chart [§ 6.42]

The guardian ad litem is potentially responsible for filing two distinct reports. The first, “concerning the proposed ward,” is required if the guardian ad litem does not attend the hearing. [Wis. Stat.](#) § 54.50(3)(c). The second, “on the advisability of the temporary guardianship,” must be filed at the hearing or, if the guardian ad litem did not meet with the ward before the hearing,

within 10 days after the court hearing. [Wis. Stat.](#) § 54.50(3)(b). The following flow chart may assist in determining the reporting duties of the guardian ad litem.

E. Paying the Guardian ad Litem [§ 6.43]

1. Amount of Payment [§ 6.44]

How, and in what amount, the guardian ad litem is paid depends on county practice, the identity of the petitioner, the financial situation of the proposed ward, whether the county has contract guardians ad litem, whether the petition is successful, and other circumstances specific to a given case. While [Wis. Stat.](#) § 54.74 limits a county's reimbursement of guardian ad litem fees to the amount set forth in [Wis. Stat.](#) § 977.08(4m)(b), most counties apply the rate set forth in [Wis. Stat.](#) § 977.08(4m)(e) for cases assigned on or after July 1, 2023. For a discussion of the statutes, rules, and case law governing the amount of the GAL's fees, see [chapter 1](#), *supra*. See also generally [SCR](#) ch. 81; *State ex rel. Friedrich v. Circuit Ct.*, [192 Wis. 2d 1](#), [531 N.W.2d 32](#) (1995).

2. Responsibility for Payment [§ 6.45]

The amount of the compensation is a separate issue from the payment of that compensation. [Wis. Stat.](#) §§ 54.46 and 54.74, taken together, create a framework for assigning responsibility for payment of the guardian ad litem's fees.

At the outset, current law assigns responsibility for payment of the guardian ad litem fees based on the success of the petitioner in imposing a guardianship. See [Wis. Stat.](#) §§ 54.46(3)(b), (c), 54.74.

If a guardian is appointed, and if the ward is indigent, then the fees of the guardian ad litem are paid by the county in which venue lies for the guardianship. [Wis. Stat.](#) §§ 54.46(3)(b), 54.74. If a guardian is appointed, but the ward is not indigent, the fees are payable from the ward's income or assets, if sufficient or, if insufficient, by the county of venue. [Wis. Stat.](#) § 54.74.

If a guardian is *not* appointed, then the petitioner is liable for any fees owed to the guardian ad litem. [Wis. Stat.](#) § 54.46(3)(c). If the county is the petitioner, then the county pays the guardian ad litem fees even if the guardianship is not granted. [Wis. Stat.](#) § 54.74. But, in guardianships in which the petitioner is not the county, and in which the guardianship petition is dismissed, the fees of the guardian ad litem are the responsibility of the petitioner. *Id.*

Comment. As a practical matter, [Wis. Stat.](#) § 54.46(3)(c) will most likely have a chilling effect on the willingness of lawyers to serve as guardians ad litem in guardianship cases. Unless the courts consistently order the petitioners in these matters to deposit money into the court, or into the lawyer's trust account, one wonders why an attorney would ever be willing to accept appointment as a guardian ad litem in a private guardianship action. Why must the guardian ad litem depend on the unsuccessful and probably unhappy petitioner for payment to cover fees arising from a court appointment? The irony is compounded in that if the guardian ad litem does a creative job so that the need for guardianship is avoided, the guardian ad litem will be rewarded for those efforts by having to seek payment from the disgruntled petitioner.

The policy behind requiring the petitioner to pay the petitioner's attorney fees in unsuccessful guardianships is understandable: it discourages petitioners (and their attorneys) from bringing unnecessary guardianships, and it protects the assets of the prevailing party in the proceedings. Requiring the unsuccessful petitioner to pay the guardian ad litem fees might be good policy if, indeed, the unsuccessful petitioner will actually pay the fees. On the other hand, and more realistically, it seems likely that the unsuccessful petitioners will *not* pay the fees of the guardian ad litem, at least not willingly. This means that the court-appointed guardian ad litem will not be paid for doing what the court and the statutes, together, require.

Practice Tip. An attorney should consider declining an appointment as a guardian ad litem in a private guardianship case unless the court requires payment, in advance, of guardian ad litem fees in a sufficient amount to cover the lawyer's hourly rate to perform all the duties and responsibilities set out in the statutes, or the county guarantees payment of those fees. In this author's opinion, it is unfair to ask an attorney to run the risk of nonpayment in a case over which that attorney has no control and in which the attorney has no fee agreement with the potential payer.

The law is silent as to how, or when, the guardian ad litem is to be paid for participating in an appeal.

III. Minor Guardianships of the Estate [§ 6.46]

A. Minor Guardianships of the Estate as They Relate to Guardian of the Person for a Child [§ 6.47]

Until August 1, 2020, minor guardianships of both the person and the estate were controlled by [Wis. Stat.](#) ch. 54 and could be petitioned for in one matter. Effective August 1, 2020, guardianships of the person for the child were removed from [Wis. Stat.](#) ch. 54 and are now controlled by [Wis. Stat.](#) § 48.9795. See [Wis. Stat.](#) § 54.10(1). Time will tell how minor guardianships of the person and estate will coexist under two different chapters. Some attorneys may find petitioning under two separate chapters for the same child to be frustrating. A process to consolidate minor guardianship of the estate with minor guardianship of the child cases is set forth in [Wis. Stat.](#) 48.9795(2)(b)1. Ultimately, the court assigned jurisdiction of the case for the guardianship of the person for the child may order the guardianships to be consolidated and assume jurisdiction over the guardianship of the estate matter as well. See Form JN 1516. For a discussion of the role of the guardian ad litem in minor guardianships of the person, see [chapter 4](#), *supra*. See also Henry J. Plum & Deanna Weiss, [Minor Guardianships of the Person: Wisconsin Children's Court Practice and Procedure](#) (2d ed. 2024). The discussion that follows in this chapter applies only to minor guardianships of the estate.

Comment. [Wis. Stat.](#) ch. 54 focuses primarily on the guardianship of adults who are incompetent or are spendthrifts, not on the needs of children. Because children do not have the same legal rights as adults, most provisions in [Wis. Stat.](#) ch. 54 are inapplicable or unworkable in the context of minor guardianships of the estate.

B. Initial Considerations [§ 6.48]

Minors need guardians of the estate in only limited situations: probate (*see infra* [ch. 9](#)), minor settlements (*see infra* [ch. 10](#)), receipt of funds as a direct beneficiary, and other unusual cases in which the minor is entitled to assets or income. Sometimes, these situations can be handled less formally than in a full guardianship action. See [Wis. Stat.](#) § 54.12 (“Exceptions to appointment of guardian”).

The only stated statutory ground for a minor guardianship of the estate is that the individual is, indeed, a minor. [Wis. Stat.](#) § 54.10(1). For a discussion of the legal rights of parents with respect to their relationship with their children, see *supra* [chapter 4](#).

C. Role of the Guardian ad Litem [§ 6.49]

The role of the guardian ad litem in minor guardianships is less defined than the role of the guardian ad litem in adult guardianships. In part, this is because the law regulating minor guardianships is ambiguous and confusing.

Minor guardianships of the estate require the appointment of a guardian ad litem. [Wis. Stat.](#) § 54.40(1). Two Wisconsin Supreme Court rules set out special requirements for guardian ad litem work but neither applies to minor guardianships of the estate. [SCR](#) ch. 35 sets out requirements for a lawyer acting as guardian ad litem “for a minor” but does not include [Wis. Stat.](#) ch. 54 in its enumeration of statutes to which the rule applies. [SCR](#) ch. 36 covers guardian ad litem appointments under [Wis. Stat.](#) ch. 54 but limits its application to guardians ad litem representing “an adult.” Accordingly, the Wisconsin Supreme Court has not imposed any particular requirements on lawyers serving as guardians ad litem in minor guardianships of the estate.

Serving as a guardian ad litem in a minor guardianship of the estate is challenging in any circumstance and is made more difficult when the petitioner is not represented by counsel. The Rules of Professional Conduct for Attorneys prohibit guardians ad litem from advising any of the participants as to law or procedure. See [SCR](#) 20:4.3. If the petitioner is self-represented, the guardian ad litem may need to explain the substantive and procedural requirements of [Wis. Stat.](#) ch. 54 while being careful not to offer any advice and not to assist in meeting those requirements.

Comment. As a practical matter, the guardian ad litem might receive incomplete contact information, if any, for the parties from the court, or the parties may be difficult to contact. Making arrangements to speak with the child may be time-consuming and frustrating. Working with self-represented individuals is difficult in many contexts but is made more difficult under [Wis. Stat.](#) ch. 54 because the role of the guardian ad litem is itself so ambiguous.

[Wis. Stat.](#) § 54.40(4) outlines specific duties of the guardian ad litem without specifically limiting those duties to the context of adult guardianships. Moreover, most (if not all) of the duties listed in [Wis. Stat.](#) § 54.40(4) necessarily apply to adult guardianships

only. Indeed, the list includes duties that simply could *not* apply in the context of a minor guardianship. The guardian ad litem is faced with the choice of either complying with the mandatory statute (the “guardian ad litem shall do all of the following”) by performing actions that make no sense in context or by using common sense in determining which of the enumerated duties apply to a minor guardianship. Much of the confusion stems from the difficulty in grafting adult guardianship substance and procedure onto the minor guardianship system. For example, it seems highly improbable that a child is entitled to a jury trial on the issue of minority, but the statute requires the guardian ad litem to advise the individual of the “right” to a jury trial. Likewise, a minor cannot execute advance directives, but the statute requires that the guardian ad litem review any the proposed ward has executed. The statute is replete with similar issues. The confusion is not limited to minor guardianships, of course. The application of [Wis. Stat. § 54.40\(4\)](#) to an adult guardianship of the estate is also complicated. For example, the requirement that the guardian ad litem review a proposed ward’s HCPOA (see [Wis. Stat. § 54.40\(4\)\(d\)1.](#)) or interview the proposed ward’s health-care agent (see [Wis. Stat. § 54.40\(4\)\(d\)2.](#)) may be overreaching in the context of a guardianship of the estate action.

Given the unworkable or ambiguous directions in [Wis. Stat. ch. 54](#), the guardian ad litem must carefully think through which duties make sense in a minor guardianship. Generally, the guardian ad litem

1. Meets with the petitioners, and with the parents, if not the petitioners, to confirm that they understand the process;
2. Confirms that notice has been provided to all interested persons (but does not volunteer to provide notice or to correct notice issues);
3. Investigates and confirms the appropriateness of the proposed guardian(s);
4. If the child is 14 or older, meets with the child and explains the nomination form (Form [GN-3320](#));
5. If the child is under 14, decides whether to meet with the child and then meets with the child (or has a good explanation for not doing so);
6. Determines whether the child should attend court (“A minor proposed ward is not required to attend the hearing,” under [Wis. Stat. § 54.44\(4\)\(b\).](#));
7. Confirms that the proposed final order does not control the minor’s estate after the minor attains majority except under limited circumstances involving gifts (see [Wis. Stat. §§ 54.64\(4\)\(c\), 54.892](#));
8. Completes any additional necessary investigation;
9. Decides whether to use Form [GN-3325](#) (Report of Guardian ad Litem (Minor Guardianship of the Estate)) and, if so, fills out the form; and
10. Attends all hearings.

Comment and Practice Tip. Form [GN-3325](#) is the Report of Guardian ad Litem (Minor Guardianship of the Estate). The statutes do not require the guardian ad litem to file a written report, but the existence of this mandatory form means that some counties require the guardian ad litem to complete and file this document. The form is not a good fit for minor guardianships. In general, the shortcomings of the form reflect the shortcomings of [Wis. Stat. ch. 54](#) when applied to children. A guardian ad litem required to use this form should do so carefully and thoughtfully, leaving boxes unchecked and inserting explanations, as appropriate.

D. Postjudgment Matters [§ 6.50]

Once a guardianship is entered, it can be dissolved only by court order. If a guardian no longer wants to be the guardian, the guardian would “resign” (Form [GN-3405](#)) and the court would appoint a new guardian. See [Wis. Stat. § 54.54](#). (Anecdotal, some counties do not allow the guardian for a minor to “resign,” although the legal authority for this is tenuous.) A guardian ad litem is generally appointed in these resignation situations but the practice varies dramatically from county to county.

If a parent wants a guardianship to be terminated, the parent must file a petition (Form [GN-3652](#)) or, in some counties, simply write a letter to the court. The court then appoints a guardian ad litem and holds a hearing on the request, pursuant to [Wis. Stat. § 54.64\(3\)](#) or (4).

Comment. [Wis. Stat. § 54.64](#) read as a whole seems to apply only to incompetency guardianships. However, [Wis. Stat. § 54.64\(3\)](#) (c) provides that the guardianship “shall terminate” if “[a] formerly minor ward attains age 18, unless the guardianship was ordered on the grounds of incompetency.” *See also* [Wis. Stat. § 54.64\(4\)\(c\)](#) (providing for termination of guardianship of the estate when “formerly minor ward attains age 18”). Accordingly, the termination procedures of [Wis. Stat. § 54.64](#) apply, at least to the extent that they can be applied when the ward is a minor.

IV. Forms [§ 6.51]

A. In General [§ 6.52]

Parties and court officials in all civil actions and proceedings in circuit court must use any applicable standard court forms. *See, e.g.,* [Wis. Stat. § 807.001](#). All the forms adopted by the Wisconsin Judicial Conference for guardianships are mandatory. The guardian ad litem should ensure that the petitioner has used the correct mandatory court forms, downloadable from the Wisconsin Court System’s website: <https://www.wicourts.gov/forms1/circuit/index.htm>. If the Judicial Conference does not create a standard court form for a particular action or pleading, then a format consistent with any statutory or court requirements may be used. [Wis. Stat. § 807.001\(4\)](#).

Guardians ad litem in guardianship proceedings should be particularly aware of these mandatory court forms that they will use as part of their practices: (1) Forms [GF-131A](#) (Order Appointing Guardian ad Litem or Attorney) and [GF-131B](#) (Consent to Act); and (2) Form [GN-3160](#) (Report of Guardian ad Litem).

For further information, contact the Records Management Committee (RMC), which advises the Director of State Courts Office and is responsible for developing the standard court forms.

The nonmandatory forms in this chapter are samples only. Attorneys must *always* check original sources of authority for current law and adapt the sample form language to fit the client’s circumstances.

B. Letter Notice of Proposed Adult Ward’s Rights (ELD-0043) [§ 6.53]

(Date of conference).

Hand-Delivered

(Name).

(Address).

Re: Guardianship of (name).

File No. (File number).

Dear (name):

I am the guardian ad litem (*attorney*) appointed to represent your interest at the upcoming guardianship hearing. This hearing will be held on (date of hearing) at (time of hearing) at the courthouse in (location).

This letter is to notify you of your rights under Wisconsin law. You are entitled to a jury trial if you desire. If you do not demand a jury, then a judge will hear the facts and render a decision. You are entitled to appeal the outcome of the hearing to the Wisconsin Court of Appeals. You are also entitled to legal counsel and to an independent medical or psychological examination on the issue of competency. If you cannot afford to hire a lawyer or a doctor or psychologist, (name of county) will pay the cost. You are entitled to attend the hearing and to cross-examine all witnesses, including the doctor who determined you need a guardian. You have the right to receive copies of all evaluations before the hearing and to secure your own evaluation and present a report of that evaluation as well.

The petition in this case, which we will review together, lists the rights that the petitioner is asking the court to determine that you are not currently able to exercise. If you disagree with that list, or if you believe that the guardianship petition is seeking a more restrictive limitation on your rights than is reasonable, please let me know. You have the right to introduce evidence to limit the scope of the guardianship requested in the petition.

I am ready to assist you in any way that I can and to help you obtain the assistance of others. If you wish to challenge these proceedings, or if you want assistance in challenging them, let me know and I will make the appropriate reports and requests to the court.

Please do feel free to contact me at any time or to have anyone contact me on your behalf.

Sincerely yours,

(Attorney's name).

C. Letter Notice of Proposed Adult Ward's Rights (Alternate Form) (ELD-0044) [§ 6.54]

Letterhead

Hand-Delivered

Re: Guardianship of (name)
File No. (File number).

Dear (proposed ward's name):

I am the guardian ad litem (*attorney*) appointed to represent your interest at the upcoming guardianship hearing. My job is figure out what I think is in your best interests and then work to make that happen. The court hearing is set for (date) at (time) at the courthouse in (city). I am meeting with you because your (mother has) (father has) (parents have) asked to become your legal (guardian) (guardians). This is not a change from when you were a child, but now that you are 18, we have a process so that this stays the same.

This letter tells you about your legal rights. Because a guardianship is something we do in a court, we want to be sure that what happens is fair and follows all the rules. During our conversation today, I will tell you about what to expect at the hearing. One thing you need to know is that the hearing is in a courtroom, and in the courtroom is a judge. The judge is in charge and will hear all the facts and sign a court order, which is a paper that says what the judge has decided. If you want, you can ask for a jury to also be in the courtroom. A jury is a group of people that listens to everything and decides whether you need a guardian. So, you can have a jury trial if you want one. If you do not ask for a jury, then just the judge will decide. If you agree with the guardianship, then you probably do not need to ask for a jury.

After the hearing, if you do not like what the judge or jury decides, you can appeal the outcome of the hearing to the Wisconsin Court of Appeals, which means that you would ask the court of appeals to look at what the judge and jury did and to decide whether the judge (*or the jury*) followed all the rules and did the right thing. If you agree with what the judge and jury did, then you will not need to ask for this kind of review.

Let's think about getting ready for the hearing. I am your guardian ad litem, which means I am a lawyer who figures out what would be best for you. If you ask, you can have a different kind of lawyer, too. This would be a lawyer of your own who would do what you want that lawyer to do, not what the lawyer thinks is best. If you want that kind of lawyer but cannot afford to pay for one, (name of county) will pay the cost. To get this kind of lawyer, you need to ask. If you agree with the guardianship, then you do not have to ask for this kind of lawyer.

A few weeks before the hearing, a doctor or a psychologist will talk to you and then write a report for the judge about whether you need a guardian. If you do not agree with that report, or even if you just do not like the doctor, you can ask for another medical or psychological examination about whether you need a guardian. If you cannot afford to pay for this, (name of county) will pay the cost. To get this new exam, though, you must ask for it.

You have the right to come to the hearing, to listen to everything, and to ask questions to all witnesses, including the doctor who decided you need a guardian. You have the right to get copies of all reports before the hearing. If you have your own evaluation, you have the right to give the judge a report of that evaluation, as well.

The petition in this case, which is a paper we will review together, lists the rights that the petitioner is asking the court to say that you are not currently able to do. If you disagree with anything on that list, let me know. At the hearing, you have the right to ask for what you want; you do not have to agree with the list in the petition. If you agree with the petition, then you do not have to do anything.

I am ready to help you in any way that I can and to help get others to help you. If you agree with the guardianship, then you do not have to do anything except come to the hearing. I will see you there! If you do not agree with the guardianship, or if you want to ask for a jury trial, independent evaluation, or your own lawyer, you need to let me know. I will then tell the judge that you do not agree with the guardianship, and the judge will appoint another lawyer to help you.

Please feel free to get in touch with me at any time or to have anyone help you get in touch with me. All of my contact information is at the top of the first page.

Sincerely yours,

D. Statement of Rights of the Proposed Adult Ward (ELD-0045) [§ 6.55]

You are entitled to a jury trial if you desire. If you do not demand a jury, then a judge will hear the facts and render a decision. You are entitled to appeal the outcome of the hearing to the Wisconsin Court of Appeals. You are also entitled to legal counsel and to an independent medical or psychological examination on the issue of competency. If you cannot afford to hire a lawyer or a doctor or a psychologist, (name of county) will pay the cost. You are entitled to attend the hearing and to cross-examine all witnesses, including the doctor who determined you are in need of a guardian. You have the right to receive copies of all evaluations before the hearing and to secure your own evaluation and present a report of that evaluation as well.

The petition in this case, which we will review together, lists the rights that the petitioner is asking the court to determine that you are not currently able to exercise. If you disagree with that list, or if you believe that the guardianship petition is seeking a more restrictive limitation on your rights than is reasonable, please let me know. You have the right to introduce evidence to limit the scope of the guardianship requested in the petition.

E. Report of Guardian ad Litem (Temporary Guardianship) (ELD-0046) [§ 6.56]

STATE OF WISCONSIN		CIRCUIT COURT	_____ COUNTY
		BRANCH	_____
In the Matter of			
(Name of Ward)			
Date of Birth: _____		Case No. _____	

Report of Guardian ad Litem

(Temporary Guardianship)

(Name), guardian ad litem, makes and files this report as required by [Wis. Stat. § 54.50\(3\)\(b\)](#).

I met with (name of ward), named above, on (date of meeting), which is a date not more than 7 calendar days after the hearing in this matter.

I am required to report to the court on the advisability of the temporary guardianship not later than 10 calendar days after the hearing. This report is filed to fulfill that requirement.

In my opinion, the temporary guardianship is advisable. The current evidence regarding (name of ward)'s alleged incapacity in the record is [list documents and document numbers from the e-file]. These documents support the need for guardianship. I am unaware of any new evidence to the contrary.

(Name of ward) does not request a rehearing on the issue of appointment of the temporary guardian. As guardian ad litem, I likewise do not request a rehearing.

Dated: _____

[Type "Electronically signed by"
and your name on this line]

Guardian ad Litem
State Bar No.

(Guardian ad Litem's address).
(Guardian ad Litem's telephone number).
(Guardian ad Litem's email address).

F. Order for Release of Confidential Information (ELD-0047) [§ 6.57]

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY
PROBATE BRANCH

In the matter of the
Guardianship of:

Alleged Incompetent Individual. Case No. _____

ORDER FOR RELEASE OF CONFIDENTIAL INFORMATION

(Name of guardian ad litem), an attorney licensed to practice in the State of Wisconsin, having been appointed guardian ad litem for (name of proposed ward). (proposed ward's date of birth),

IT IS ORDERED that the guardian ad litem shall have access to all records of any kind relating to the named individual. The records that shall be open for inspection and copying include the following, without limitation by enumeration: school, health and medical, peace officers', law enforcement, court, psychological, psychiatric, social services, and any other records relating to or involving the named individual.

IT IS FURTHER ORDERED that the guardian ad litem shall have access to all such enumerated records in full, even to the extent that such records disclose information relating to any other persons who have or may come in contact with the named individual.

IT IS FURTHER ORDERED that the guardian ad litem may confer directly with law enforcement personnel and all other persons or agencies having custody of the records ordered released and may request and receive oral reports and written reports as deemed necessary.

IT IS FURTHER ORDERED that upon request of the guardian ad litem, the register in probate shall furnish the guardian ad litem with a certified copy of this order without charge.

V.

Appendix [§ 6.58]

A. Appendix 6A: Indicators of Possible Elder Abuse (ELD-0054) [§ 6.59]

These categories and lists are based primarily on a Wisconsin Department of Health Services (DHS) publication titled *Abuse, Neglect, and Exploitation: What to Look For*. Div. of Pub. Health, Wis. DHS, Publ'n P-01550 (July 2016), <https://www.dhs.wisconsin.gov/publications/p01550.pdf>.

Indicators of possible physical abuse:

- ☐ Bruises, black eyes, burns, lacerations, or pressure marks
- ☐ Broken bones, skull fractures, sprains, dislocations, internal injuries, or bleeding
- ☐ Unexplained, or poorly explained, physical injuries (especially if repeated)
- ☐ Broken eyeglasses, hearing aids, or other assistance devices
- ☐ Denial of access to communication or mobility aids
- ☐ Signs of confinement or restraint
- ☐ Frequent use of emergency room or hospital care; doctor-hopping

Indicators of possible emotional abuse:

- ☐ Individual is passive, helpless, or withdrawn.
- ☐ Individual is anxious, trembling, agitated, or fearful.
- ☐ Individual is overly worried that the conversation with the interviewer will be communicated to a caregiver or family member.
- ☐ Individual self-blames for the situation or the caregiver's behavior.
- ☐ Caregiver or family member yells, threatens, or belittles.
- ☐ Caregiver or family member claims to be or appears to feel entitled to make all decisions; speaks for the individual at professional appointments.
- ☐ Caregiver or family member denies or creates long waits for food, medication, personal care, heat, or transportation; does not follow medical recommendations.
- ☐ Caregiver or family member tries to control all aspects of the individual's daily living, including access to telephone, mail, and friends.
- ☐ Caregiver or family member threatens to institutionalize the individual.
- ☐ Caregiver or family member threatens to abuse or kill service or companion animals.

Occurrences that may indicate financial or material abuse:

- ☐ Unusual activity in bank accounts, including unexplained withdrawals
- ☐ Additional names on bank signature card
- ☐ Unauthorized withdrawal of funds using automated teller machine (ATM) or mobile banking
- ☐ Unexplained disappearance of funds or valuable possessions
- ☐ Unexplained purchases of gift cards
- ☐ Transfer of assets to caregiver or family member
- ☐ Forged signatures on checks or other financial or legal documents
- ☐ Unexplained charges or overpayment for goods or services
- ☐ Creation of or unexplained changes in POAs, wills, or other legal documents, or execution of these documents when the individual was incapable of understanding them
- ☐ An agent's refusal to spend money on the care of the individual or on unpaid bills, even though adequate resources are available to cover them

Characteristics of the individual that may indicate neglect or self-neglect:

- ☐ Dirty appearance; urine or fecal odors
- ☐ Filthy or animal-infested residence
- ☐ Inadequate or spoiled food in the residence
- ☐ Emaciation, frailty, weakness, or dehydration
- ☐ Untreated health problems
- ☐ Medications given improperly or not at all
- ☐ Unsafe living conditions (heat, water, electricity, or appliances)
- ☐ Absence of needed home medical equipment
- ☐ Animals in home receiving inadequate care
- ☐ Inability to explain routines, including personal routines and financial routines
- ☐ Signs of confusion or other forms of impaired cognition
- ☐ Failure to keep health-care appointments
- ☐ Inability to manage activities of daily living
- ☐ Resistance to offers of appropriate help

Chapter 7

Protective Services and Protective Placement: Wis. Stat. Ch. 55

[Victoria Davis Dávila](#)

I. Scope [§ 7.1]

This chapter discusses the guardian ad litem's role in proceedings under [Wis. Stat.](#) ch. 55, the protective service system. This chapter outlines the purpose of [Wis. Stat.](#) ch. 55 and defines protective placement and court-ordered protective services. The chapter then discusses the procedures required for protective placement, protective services, and emergency protective placement and services. What follows is a discussion of the guardian ad litem's role in protective services or protective placement proceedings and annual reviews. The chapter also includes information about how the guardian ad litem is paid.¹

Caution. [Wis. Stat.](#) ch. 55, last recodified in 2006, has not kept pace with significant changes in how long-term care services are delivered to elderly people and people with disabilities. By July 1, 2018, Family Care (managed long-term care) and IRIS (a self-

directed home and community-based services program), neither of which is administered by counties, had replaced the two county-based funding programs (the Community Options Program (COP) and Community Integration Program (CIP)) in every county in the state. *See generally* Wis. Dep’t of Health Servs., *Family Care*, <https://www.dhs.wisconsin.gov/familycare/index.htm> (last revised Sept. 17, 2024); Wis. Dep’t of Health Servs., *IRIS (Include, Respect, I Self-Direct)*, <https://www.dhs.wisconsin.gov/iris/index.htm> (last revised Oct. 1, 2024). *See* section 7.27, *infra*, for historical information about the transition between these programs. Attorneys should be aware that some statutes might still refer to county programs that no longer exist.

The statewide expansion of Family Care and IRIS has had unintended consequences for [Wis. Stat.](#) ch. 55. The capacity of counties to do initial assessments and *Watts* reviews, *see State ex rel. Watts v. Combined Cmty. Servs. Bd.*, [122 Wis. 2d 65](#), [362 N.W.2d 104](#) (1985), has been eroded. This is because those functions have been dispersed to other entities. Former county workers have moved to aging and disability resource centers, managed-care organizations (MCOs), or other work altogether. Indeed, the expanded role of MCOs and IRIS consultant agencies—the entities that now manage the bulk of long-term care services to elderly and disabled adults under Family Care and IRIS—are not currently recognized in [Wis. Stat.](#) ch. 55. Addressing the vacuum created by the alterations to the traditional method of county-administered assessment has become the subject of discussion and debate.

II. Purpose of [Wis. Stat.](#) Ch. 55: The Protective Service System [§ 7.2]

[Wis. Stat.](#) ch. 55 is intended to protect mentally disabled persons from abuse, financial exploitation, neglect, and self-neglect, while at the same time protecting their constitutional rights, particularly the right to the least possible restriction on their personal liberty. [Wis. Stat.](#) § 55.001. [Wis. Stat.](#) ch. 55 specifically focuses on persons who have a developmental disability, a serious and persistent mental illness, a chronic substance abuse disorder, a brain injury, a degenerative brain disorder, or other like incapacities. *See supra* [ch. 5](#) (characteristics of these disabilities). Under the law, mentally disabled persons can receive a variety of community services, such as home-delivered meals (Meals on Wheels), chore services, day activities, case management, and respite care, that enable them to live in their own homes or in community residential settings. Services may be on a voluntary or court-ordered basis. In addition, it is possible under the law to have a court-ordered residential placement, generally referred to as a protective placement.

The supreme court has held that persons with Alzheimer’s disease are most appropriately served under [Wis. Stat.](#) ch. 55 rather than [Wis. Stat.](#) ch. 51. *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, [2012 WI 50](#), ¶ 2, [340 Wis. 2d 500](#), [814 N.W.2d 179](#). The court cited the differences between the two systems, noting that [Wis. Stat.](#) ch. 55 is designed to treat people with long-term conditions that are not amenable to treatment, while [Wis. Stat.](#) ch. 51 is designed for short-term treatment and rehabilitation. *Id.* ¶ 13. Further, the court explained, [Wis. Stat.](#) ch. 55 provides the means to deal with the challenging behaviors that often accompany Alzheimer’s disease. *Id.* ¶¶ 13–20. Those means include, most significantly, the authority to administer psychotropic medications involuntarily. *Id.* ¶ 18. At the same time, [Wis. Stat.](#) ch. 55 affords the individual with protections that are unavailable under [Wis. Stat.](#) ch. 51, one of which is the appointment of a guardian ad litem. *Id.* ¶¶ 24–28. It is not impossible for a person to meet both the legal standards for protective placement and the legal standards for a mental health commitment. The petitioner should decide which avenue to pursue based on which standards the petitioner believes ultimately can be proved. *See Waukesha Cnty. Dep’t of Health & Hum. Servs. v. M.S. (In re Guardianship of M.S.)*, No. [2022AP2065](#), 2023 WL 5743040, ¶ 6 (Wis. Ct. App. Sept. 6, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review denied).

The court of appeals addressed the primacy of [Wis. Stat.](#) ch. 55 over related statutes when dealing with questions of least restrictive environment in *LaBeree v. LIRC*, [2010 WI App 148](#), [330 Wis. 2d 101](#), [793 N.W.2d 77](#). In that case, a court in a [Wis. Stat.](#) ch. 55 proceeding had ordered home-based care for a person whose employer had been paying his medical expenses under the Worker’s Compensation Act, [Wis. Stat.](#) ch. 102. The court of appeals held that in a worker’s compensation case, an employer cannot revisit the issue of medical necessity of a community placement once a [Wis. Stat.](#) ch. 55 court has found community placement to be the least restrictive environment. Thus, the Department of Workforce Development could not subsequently limit the employer’s payment to the rate a nursing home would charge to take care of a person based on the department’s finding that the community placement was not medically necessary. As the court stated, “[a] protectively placed individual whose employer has conceded liability for worker’s compensation purposes should not have liberty conditioned on his or her ability to pay for medical treatment.” *Id.* ¶ 23.

III. Court-Ordered Protective Services [§ 7.3]

A. Protective Services in General [§ 7.4]

If a circuit court determines that an individual is incompetent, the court may order protective services if it finds that, as a result of a mental disability, the individual “will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others” if the individual does not receive services. [Wis. Stat.](#) § 55.08(2). This order may be obtained in a special proceeding for protective services only, or it may be entered as an alternative to protective placement. [Wis. Stat.](#) § 55.12(8).

A proceeding for protective services is subject to the same procedural requirements as for protective placement. This includes the petition, notice requirements, hearings, and evaluations. [Wis. Stat.](#) §§ 55.075, 55.09, 55.10, 55.11. See sections [7.12–.15](#), *infra*, for a discussion of these procedural requirements. In addition, protective service orders may be modified or terminated using the same procedures as for protective placement orders. [Wis. Stat.](#) §§ 55.16, 55.17. See sections [7.49–.50](#), *infra*, for a discussion of these proceedings. However, protective service orders are not subject to the same annual review requirements as protective placements. [Wis. Stat.](#) §§ 55.18 (annual review of protective placement), 55.195 (duties of guardian ad litem for protective services reviews). In all the court proceedings relating to court-ordered protective services, a guardian ad litem must be appointed. [Wis. Stat.](#) § 55.10(4)(b). See sections [7.21–.33](#) and section [7.46](#), *infra*, for a discussion of the guardian ad litem’s role.

B. Psychotropic Medication as a Protective Service [§ 7.5]

1. Voluntary Administration of Psychotropic Medication [§ 7.6]

A guardian of the person may be authorized to consent to the voluntary administration of psychotropic medication. [Wis. Stat.](#) § 54.25(2)(d)2.ab. Under [Wis. Stat.](#) ch. 54, *psychotropic medication* is defined as a “prescription drug ... that is used to treat or manage a psychiatric symptom or challenging behavior.” [Wis. Stat.](#) § 54.01(28); *see also* [Wis. Stat.](#) §§ 55.01(6s), 55.14(1)(d) (same definitions under [Wis. Stat.](#) ch. 55).

If the guardian of the person is given the authority to consent to the administration of medication, including psychotropic medication, the guardian may do so if the guardians determines it is in the ward’s best interest and if the guardian has first made a good-faith attempt to discuss with the ward the ward’s voluntary receipt of psychotropic medication and the ward does not protest. [Wis. Stat.](#) § 54.25(2)(d)2.ab. A *protest* is defined to mean that the ward has made “more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of the ... medication.” [Wis. Stat.](#) § 54.25(2)(d)2.ab. It does not include a negative response to the proposed *method* of administering the medication. *Id.*

2. Involuntary Administration of Psychotropic Medication [§ 7.7]

A special proceeding exists in which involuntary administration of psychotropic medication may be ordered as a protective service. [Wis. Stat.](#) § 55.14. *Involuntary administration of psychotropic medication* is defined as (1) placing the medication in the person’s food or drink with knowledge that the person protests receipt of the medication, (2) forcibly restraining the person to enable administration of the medication, or (3) requiring the person to take the medication as a condition of receiving privileges or benefits. [Wis. Stat.](#) § 55.14(1)(a).

The standard for court-ordered involuntary administration of psychotropic medication is as follows:

1. A physician has prescribed psychotropic medication for the individual. [Wis. Stat.](#) § 54.14(3)(a).
2. The person is not competent to refuse psychotropic medication because of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, and after the advantages and disadvantages of and alternatives to the medication have been explained, the person is incapable of expressing an understanding of this information or is substantially incapable of applying the information to the person’s condition to make an informed choice about whether to accept or refuse the medication. [Wis. Stat.](#) § 54.14(3)(b), (1)(b).
3. The individual has refused to take the medication voluntarily, or attempting to administer the medication voluntarily is not feasible or is not in the best interests of the person. [Wis. Stat.](#) § 54.14(3)(c).
4. The individual’s condition is likely to be improved by the medication. [Wis. Stat.](#) § 54.14(3)(d).

5. Unless the medication is administered involuntarily, the individual will incur a substantial probability of physical harm, impairment, injury, or debilitation or will present a substantial probability of physical harm to others. This probability must be evidenced by one of the following:
 - a. Evidence that the individual meets one of the dangerousness requirements in [Wis. Stat. § 51.20\(1\)\(a\)2.a.–e.](#), *see infra* [ch. 8](#), or
 - b. The individual's history of at least two episodes, at least one of which occurred in the immediately preceding 24 months, that indicate a pattern of overt activity, attempts, threats to act, or omissions that resulted from the individual's failure to participate in treatment, including receipt of psychotropic medication, and that resulted in a finding of probable cause for commitment, a settlement agreement, or a commitment order under [Wis. Stat. ch. 51](#). [Wis. Stat. § 55.14\(3\)\(e\)](#).

A petition for involuntary administration of psychotropic medication must include a statement, signed by a physician who has personal knowledge of the individual, that provides clinical information about the individual's condition and the reasons why the medication is necessary. [Wis. Stat. § 55.14\(4\)](#). The individual has the right to secure an independent evaluation concerning the allegations in the petition and whether involuntary administration of the medication would be in the individual's best interests. [Wis. Stat. § 55.14\(6\)](#). A guardian ad litem and adversary counsel must be appointed. [Wis. Stat. § 55.14\(5\)](#), (7). Petitions must be heard within 30 days after the filing of the petition. [Wis. Stat. § 55.14\(7\)](#). Apart from these procedures, the hearing requirements are the same as those for court-ordered protective services or protective placement. *See* [Wis. Stat. § 55.10](#).

If the court finds that the individual meets the standard, and the other requirements for involuntary administration of psychotropic medication have been met, it may issue an order authorizing the following: (1) the individual's guardian to consent to involuntary administration of the medication, and (2) the involuntary administration of the medication as a protective service. [Wis. Stat. § 55.14\(8\)](#). The order must require that a treatment plan be developed for the person, which includes a plan for the involuntary administration of the medication. If the person is in a nursing home or hospital, that facility must develop the plan. If the person is in the community, the county department or a contract agency must develop the plan. The guardian and the court must then approve the plan. [Wis. Stat. § 55.14\(8\)\(a\)](#).

Note. Throughout this chapter, the term *county department* is used to refer to the county department of human services, community programs, or social services that is designated by the county board of supervisors to have the responsibility to plan for and provide protective services and protective placements, or to enter into a contract with another agency to provide protective services and protective placements. *See* [Wis. Stat. § 55.02\(2\)](#).

The court will order the individual to comply with the treatment plan. [Wis. Stat. § 55.14\(8\)\(b\)](#). The order must specify the method of involuntary administration of the medication that will be used if the person fails to take the medication. If forcible restraint is authorized, it must specify that a person licensed as a registered nurse, licensed practical nurse, physician, or physician assistant be present and that the facility keep records of the involuntary administration of the medication. *Id.*

If the individual fails to comply with the plan for court-ordered medication and it is necessary to transport the individual to a facility where forcible restraint can be used to administer the medication, the corporation counsel must file with the court a statement of the facts concerning the noncompliance. The statement must be signed by the person's guardian and the director, or designee, of the county department or a contract agency that developed the treatment plan. It must be sworn to be true by and be based on information and belief of the persons signing it. If the court finds by clear and convincing evidence that the individual has substantially failed to comply with administration of the court-ordered psychotropic medication, the court may issue an order authorizing law enforcement officers to take the person into custody and transport the person to an appropriate facility for administration of the medication. [Wis. Stat. § 55.14\(9\)](#).

Orders under [Wis. Stat. § 55.14](#) must be reviewed annually following the procedures set forth in [Wis. Stat. § 55.19](#). *See infra* [§ 7.45](#). For an individual under a protective placement order and an order for psychotropic medication, the reviews must take place at the same time. [Wis. Stat. § 55.19\(1\)\(bm\)](#).

When a person is subject to or may be subject to [Wis. Stat. ch. 55](#), the remedies available under [Wis. Stat. ch. 55](#) must be considered before resorting to mental commitment under the so-called fifth standard, [Wis. Stat. § 51.20\(1\)\(a\)2.e](#). *Dane Cnty. v. Kelly M. (In re Mental Commitment of Kelly M.)*, 2011 WI App 69, ¶ 32, 333 Wis. 2d 719, 798 N.W.2d 697. The fifth standard “addresses involuntary commitment based on an individual's inability by reason of mental illness to understand the advantages and disadvantages of medication or treatment for the mental illness.” *Id.* ¶ 1; *see also infra* [ch. 8](#) (standards for commitment). As long as

[Wis. Stat.](#) ch. 55 remedies (including involuntary administration of psychotropic medication under [Wis. Stat.](#) § 55.14) will reduce the person's risk of incurring severe harm to less than a substantial probability, then commitment under [Wis. Stat.](#) § 51.20(1)(a)2.e. is inappropriate. *Kelly M.*, [2011 WI App 69](#), ¶ 32, [333 Wis. 2d 719](#). The court in *Kelly M.* noted that the Wisconsin Legislature had specifically created a fifth-standard-commitment exclusion for people who could be successfully treated under [Wis. Stat.](#) ch. 55. *Id.* ¶ 30. The court rejected, however, the patient's argument in *Kelly M.* that being subject to [Wis. Stat.](#) ch. 55 precluded commitment under the fifth standard in all circumstances. *Id.* ¶¶ 19–22. Thus, mental commitment under the fifth standard remains a possibility for a person subject to an order for protective placement or services, but only if there has been a determination that the [Wis. Stat.](#) ch. 55 remedies will not reduce the risk of severe harm to less than a substantial probability.

IV. Protective Placement [§ 7.8]

A. What Is Protective Placement and When Is It Required? [§ 7.9]

Protective placement is a court-ordered placement of a person who has been adjudicated incompetent to a long-term residential facility such as an adult family home, community-based residential facility (CBRF), or nursing home, or to a home placement, such as a supported apartment or a relative's home. See [Wis. Stat.](#) § 55.12(2). It is not to be used for placements into acute-psychiatric-treatment facilities. *Id.* For certain mentally disabled people who are disabled to the extent that community treatment is not possible, protective placement may be an acceptable alternative. This choice, however, must be made very carefully because protective placement carries with it fewer protections than civil commitment (for example, civil commitment has a higher standard of dangerousness and more procedural protections, such as automatic appointment of defense counsel and strict timelines for hearings) and is a long-term residential placement, unlike the short-term civil commitment. Once protectively placed, however, a person has all the patients' rights under [Wis. Stat.](#) § 51.61, including the right to receive prompt and adequate treatment. See [Wis. Stat.](#) § 55.23. For further definition of the rights of a person under protective placement or civil commitment and the functions of protective placement and civil commitment, see [chapter 5](#), *supra*. See [chapter 8](#), *infra*, for a discussion of the delivery of acute psychiatric treatment and a chart of the differences between protective placement and civil commitment. See [chapter 4](#), *supra*, for information on out-of-home placements for children with special needs.

If a person has been adjudicated incompetent, a protective placement order is necessary if the person will be placed in a facility with 16 or more beds. See [Wis. Stat.](#) §§ 55.03(4), 55.055(1)(a). Without a protective placement order, the guardian may consent to admission of the person to a facility with fewer than 16 beds. [Wis. Stat.](#) § 55.055(1)(a). The guardian may also consent to admission of the person to a nursing home or similar facility for a stay of up to 60 days if the person needs recuperative care or is at risk of self-harm or of harming others. The stay can be extended for an additional 60 days if a petition for protective placement is filed. [Wis. Stat.](#) § 55.055(1)(b). In addition, if the ward lives with the guardian, the guardian can consent to the ward's temporary admission to a facility to release the guardian for a vacation or a family emergency. [Wis. Stat.](#) § 55.055(5). For further discussion of the functions of guardianship and of the guardian's powers, see [chapter 6](#), *supra*.

[Wis. Stat.](#) § 55.055 addresses situations in which the guardian and the ward are not in the same state. If a ward was found to be incompetent in another state but is a resident of Wisconsin, the guardian can consent to the person's admission to a facility with fewer than 16 beds or a facility with more than 16 beds for up to 60 days. A petition to transfer the guardianship from the other state to Wisconsin and, if applicable, a petition for protective placement, must be filed in Wisconsin within 60 days after the admission. [Wis. Stat.](#) § 55.055(1)(c).

A guardian who resides in Wisconsin may consent to the admission to a Wisconsin facility for a ward who lives in and was found incompetent in another state if the guardian intends to move the ward to Wisconsin within 30 days after the consent to the admission. A petition to transfer the guardianship and, if applicable, a petition for protective placement, must be filed within 60 days after the ward's admission. [Wis. Stat.](#) § 55.055(1)(d).

Persons who were competent when they were admitted to a nursing home or CBRF with 16 beds or more, but who have subsequently become incompetent, must have *both* a guardian and a protective placement to remain in the facility, unless a health-care power of attorney has been activated and specifically authorizes the agent to consent to admission to such facilities, see *infra* (discussing [Wis. Stat.](#) § 155.20(2)(c)). When the petition for guardianship is filed, a petition for protective placement must also be filed. The person can remain in the facility during the course of the court proceedings. [Wis. Stat.](#) § 55.055(2)(b); see also *Agnes T. v. Milwaukee Cnty. (In re Guardianship of Agnes T.)*, [189 Wis. 2d 520](#), [525 N.W.2d 268](#) (1995). [525 N.W.2d 268](#) (1995).

Other provisions also allow the transfer of certain persons, without a court-ordered protective placement, from hospitals to nursing homes or CBRFs. See [Wis. Stat.](#) § 50.06. These provisions apply to persons found to be incapacitated by two physicians or one physician and one psychologist. [Wis. Stat.](#) § 50.06(4). *Incapacitated* is defined as being unable to receive and evaluate information effectively or to communicate decisions to such an extent that the person lacks the capacity to manage the person's health-care decisions. [Wis. Stat.](#) § 50.06(1). These provisions do not apply, however, to persons who are diagnosed as developmentally disabled or mentally ill at the time of the transfer. [Wis. Stat.](#) § 50.06(2)(b). They also do not apply to persons who already have a court-appointed guardian or a valid power of attorney for health care. [Wis. Stat.](#) § 50.06(2).

A closely related family member or close friend may consent to the incapacitated person's admission to a nursing home or CBRF for up to 60 days. See [Wis. Stat.](#) § 50.06(3), (6). The family member or close friend may also make health-care decisions for the incapacitated person during this time period. [Wis. Stat.](#) § 50.06(5)(a). Before admission, a petition for guardianship and protective placement must be filed with the court. [Wis. Stat.](#) § 50.06(2)(c). The petition must be heard within 60 days. See [Wis. Stat.](#) § 50.06(6). However, if the incapacitated person "verbally objects to or otherwise actively protests the admission," or if a family member or close friend alleges that the designated decision maker is making health-care decisions that are not in the person's best interest, the petition must be heard as soon as possible. [Wis. Stat.](#) §§ 55.10(1), 54.44(1)(b).

In addition, if the person objects to the admission, the facility must notify the county department. A representative of the department must meet with the person and, if the person is still objecting, the representative must assist with discharge of the person from the facility and with finding alternative living arrangements or initiate an emergency protective placement. [Wis. Stat.](#) § 50.06(2)(d).

If after 60 days the person is still in the facility and no guardian has been appointed, placement and decision-making authority may be extended for an additional 30 days to allow the facility to make discharge plans for the person. [Wis. Stat.](#) § 50.06(6). The person who consented to the admission may at any time request a functional screening and a financial and cost-sharing screening by an aging and disability resource center to determine eligibility for the Family Care benefit (or the IRIS program). [Wis. Stat.](#) § 50.06(7).

An alternative to protective placement for some persons is the durable power of attorney for health care. A health-care agent can make a long-term placement of an incapacitated person who is not mentally ill or developmentally disabled into a nursing home or a CBRF if the principal has explicitly given the agent this authority in the power of attorney for health care. If the proposed ward has an activated power of attorney for health care but is actively objecting to admission into a facility, then an order of protective placement will be required. In addition, an agent may make a placement of *any* incapacitated person, including one with mental illness or developmental disabilities, into a nursing home or a CBRF for short-term recuperative care (90 days) or respite care (30 days). [Wis. Stat.](#) § 155.20(2)(c). In these situations, a protective placement is not required.

B. Standard for Protective Placement [§ 7.10]

A county department, the Wisconsin Department of Health Services (DHS), an agency under contract with the county department, a guardian, or an interested person may petition the court for the protective placement of an individual. See [Wis. Stat.](#) § 55.075(1). If the person for whom the placement is sought does not have a guardian, then a petition for guardianship must accompany the protective placement petition. Generally, a person must be an adult to be eligible for protective placement, but minors who are at least 14 years old and are alleged to have a developmental disability also may be eligible. [Wis. Stat.](#) § 55.06. The petition for placement must state all the following:

1. The person has a primary need for residential care and custody.
2. Except in the case of a developmentally disabled minor, the person has been adjudicated incompetent or has had a petition for guardianship filed with the court.
3. As the result of a degenerative brain disorder, a serious and persistent mental illness, a developmental disability, or other like incapacities, the person is so totally incapable of providing for the person's own care and custody as to create a substantial risk of serious self-harm or harm to others.
4. The person has a disability that is permanent or likely to be permanent.

[Wis. Stat.](#) §§ 55.075(2), 55.08(1).

A protective placement order cannot be terminated solely because the person who is subject to the order is currently placed in a facility that has fewer than 16 beds and the person does not object to an ongoing placement in that facility. *Jackson Cnty. Dep't of Health & Hum. Servs. v. Susan H. (In re Protective Placement of Susan H.)*, 2010 WI App 82, 326 Wis. 2d 246, 785 N.W.2d 677. Under [Wis. Stat. § 55.055](#), it is possible in some circumstances for a guardian to consent to a ward's admission to a facility with fewer than 16 beds. In *Susan H.*, the court of appeals confirmed that a protective placement may be terminated only if the standards for protective placement (including "a primary need for residential care and custody" under [Wis. Stat. § 55.08\(1\)\(a\)](#)) are no longer present for the individual. Jackson County had argued that because a guardian can consent to a ward's admission to a facility of fewer than 16 beds under [Wis. Stat. § 55.055](#), and the ward did not object to such a placement in this case, there were sufficient grounds to terminate the placement order. The court rejected the county's argument as being contrary to the plain language of [Wis. Stat. §§ 55.08\(1\) and 55.17](#), which govern the termination of protective placements.

Comment. The *Susan H.* decision put to rest an issue that had clouded protective placement cases for a long time. Some counties had reasoned that because a protective placement order is always required when placement is in a facility of 16 or more beds, a protective placement was never required when placement was in a smaller facility. The court's decision recognized that the size of the facility to which someone is placed is not relevant to whether the person has a "primary need for residential care and custody." That need is what determines the requirement for a protective placement order.

It is essential to meet the substantive requirements and burden of proof for a protective placement. The court of appeals has indicated, in at least two unpublished but citable opinions, a lack of tolerance for proceedings that do not carefully address the issues basic to a determination for the need for a protective placement under [Wis. Stat. § 55.08\(1\)](#). *Wood Cnty. Hum. Servs. v. James D. (In re Guardianship & Protective Placement of James D.)*, No. 2013AP1378, 2013 WL 5941384 (Wis. Ct. App. Nov. 7, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)](#)) (reversing continuation of protective placement order because record failed to include evidence that individual's disability was permanent or likely to be permanent); *Wood Cnty. v. Zebulon K. (In re Guardianship & Protective Placement of Zebulon K.)*, Nos. 2011AP2387, 2011AP2394, 2013 WL 451972 (Wis. Ct. App. Feb. 7, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (reversing protective placement order because of lack of evidence on conditions that developmentally disabled brothers posed "substantial risk of serious harm" or were incapable of providing for their own care and custody).

C. Overview of the Procedures [§ 7.11]

1. Petition and Notice Requirements [§ 7.12]

A case for protective placement or protective services is initiated by the filing of a petition. It may be filed by one person, an entity, or a combination of both, and must be based on personal knowledge about the person alleged to need protective placement or services. [Wis. Stat. § 55.075\(1\), \(2\)\(b\)](#). Generally, a petition for guardianship is filed along with the petition for protective placement or services. However, it is possible to file for protective placement or services for a person who already has been found incompetent and has a guardian. If the guardianship was established more than 12 months before the filing of a petition for protective placement or services, the court must review the finding of incompetency. [Wis. Stat. § 55.075\(3\)](#).

The petition must be filed in the county where the individual resides or is physically present. Residence is determined by the individual's guardian or by reference to [Wis. Stat. § 51.40](#), if applicable. [Wis. Stat. § 55.075\(5\)\(a\)](#). The county of residence will be fiscally responsible for the individual's services. *Id.* Because there may be a dispute about where the individual is a resident, the statute provides a procedure for a court determination of residency and venue. The court must direct that notice of the proceedings be given to any potentially fiscally responsible counties. [Wis. Stat. § 55.075\(5\)\(b\), \(bm\)](#). After a hearing on the matter, the court may determine whether venue lies where the petition was filed or in another county. If it is in another county, the record must be certified to the court in the other county. [Wis. Stat. § 55.075\(5\)\(b\), \(bm\)](#). If the receiving county objects to the court's finding of venue, the court may refer the matter to the DHS for a determination of residency under [Wis. Stat. § 51.40\(2\)\(g\)](#) and suspend ruling on the motion for change of venue until the DHS has made a final determination of residency. [Wis. Stat. § 55.075\(5\)\(bm\)](#).

Note. Beginning with the enactment of 2023 Wis. Act 68, [Wis. Stat. § 51.40\(2\)](#) includes placements made by MCOs. *See* 2023 Wis. Act 68. If an individual is placed by an MCO, the individual's county of residence remains the one where the individual resided immediately before the placement. [Wis. Stat. § 51.40\(2\)\(a\)2](#). For example, an individual who lived in County X but was placed by an MCO in a facility in County Y is a resident of County X for purposes of [Wis. Stat. § 51.40\(2\)](#).

Notice of the petition must be served personally on the person to be protected at least 10 days before the date of the hearing on the petition. The person serving the notice must inform the person to be protected of the contents of the notice and must certify to the court that the petition was served and notice given. [Wis. Stat. § 55.09\(1\)](#). Notice of the hearing must also be served personally or by mail on the following: the guardian, guardian ad litem, and legal counsel, if any; the agent under an activated power of attorney for health care; any presumptive adult heirs; other persons who have physical custody of the person; the county department overseeing protective services; the DHS if a placement into one of the centers for the developmentally disabled is contemplated; other governmental or private agencies from whom the individual is receiving aid; and others as required by the court. [Wis. Stat. § 55.09\(2\)](#).

Note. [Wis. Stat. § 55.09\(2\)\(i\)](#) also states, in part, that notice must be given to “the county department that is participating in the program under [[Wis. Stat. § 46.278](#)] of the county of residence of the individual sought to be protected.” As of July 1, 2018, CIP, the program to which [Wis. Stat. § 46.278](#) purportedly applies, no longer exists. See *supra* § [7.1](#); *infra* § [7.27](#). It is unclear which, if any, county department would be provided notice under this provision. For people in Family Care or IRIS (the Medicaid-funded programs that replaced the county-based home- and community-based long-term support programs), notice of the petition should be provided to the person’s MCO or, in the case of IRIS, the person’s IRIS consultant agency. These entities are “governmental or private [agencies] from whom the individual sought to be protected is ... receiving aid,” which are entitled to notice under [Wis. Stat. § 55.09\(2\)\(f\)](#).

2. Guardian ad Litem Appointment [§ 7.13]

In all cases, a guardian ad litem must be appointed. [Wis. Stat. § 55.10\(4\)\(b\)](#); see *infra* §§ [7.21–.33](#) (discussing role of guardian ad litem in initial protective services or protective placement proceedings). The court must require representation by legal counsel when the person requests such representation at least 72 hours before the hearing, the guardian ad litem or another person states that the person is opposed to the petition, the petition alleges that the person is incompetent to consent to psychotropic medication, or the court determines that the interests of justice require it. [Wis. Stat. § 55.10\(4\)\(a\)](#).

Note. Some counties automatically appoint counsel for any protective placement petition, regardless of the individual’s contest posture.

3. Evaluation [§ 7.14]

After the petition has been filed, a comprehensive evaluation of the person’s needs must be performed so that an appropriate placement can be ordered if needed. [Wis. Stat. § 55.11\(1\)](#). The county department must coordinate the multidisciplinary resources in the community to assist the court in obtaining this evaluation. See [chapter 5, supra](#), for more information on evaluations. A copy of the evaluation must be given to the person or the person’s attorney, the agent under any activated power of attorney for health care, the guardian ad litem, and the guardian, if there is one, at least 96 hours before the court hearing on the placement. [Wis. Stat. § 55.11\(3\)](#). The privilege rule under [Wis. Stat. § 905.04](#) does not apply to court-ordered examinations or the review of treatment records in guardianship, protective placement, or protective services proceedings. The privilege also does not apply to the testimony in a guardianship or protective services or placement case, of a physician, psychologist, registered nurse, chiropractor, social worker, marriage and family therapist, or professional counselor who has determined in the course of diagnosis or treatment that the person is in need of guardianship, protective placement, or protective services. See [Wis. Stat. § 905.04\(4\)\(a\), \(am\), \(b\)](#).

If the person has a developmental disability and the court is considering placement into a state center for the developmentally disabled, the court must request a statement or testimony from the DHS regarding whether the placement is appropriate and is consistent with the center’s purpose. [Wis. Stat. § 55.11\(5\)](#).

Note. If the court is considering placement of such an individual into an intermediate facility or nursing home, [Wis. Stat. § 55.11\(6\)](#) provides that the court must request a statement or testimony from the county department administering the “program under [[Wis. Stat. § 46.278](#)] regarding whether the individual’s needs could be met in the community. As of July 1, 2018, CIP, the program to which [Wis. Stat. § 46.278](#) purportedly applies, no longer exists. It has been replaced in every county in the state by the Family Care and IRIS programs, neither of which are administered by counties. See *supra* § [7.1](#); *infra* § [7.27](#). It is unclear which, if any, entity is required to provide the information required by [Wis. Stat. § 55.11\(6\)](#). As a practical matter, these cases seldom arise because there are so few remaining institutional facilities for people with developmental disabilities.

Under [Wis. Stat.](#) § 55.11(2), the individual to be protected has the right to an independent evaluation. If the person is indigent, the county must pay the expense. [Wis. Stat.](#) § 55.11(2). Often a request for an independent evaluation will yield an additional “examining physician’s or psychologist’s report.” Form [GN-3130](#). A request for an independent comprehensive evaluation should be explicitly stated and refer to [Wis. Stat.](#) § 55.11(2).

There is no requirement that any witness in a [Wis. Stat.](#) ch. 55 proceeding—whether an initial hearing or a *Watts* review, *see State ex rel. Watts v. Combined Cmty. Servs. Bd.*, [122 Wis. 2d 65](#), [362 N.W.2d 104](#) (1985); *see infra* § [7.38](#)—have medical expertise. *See Douglas Cty. v. J.M. (In re Guardianship of J.M.)*, No. [2022AP2035](#), 2023 WL 8230284, ¶ 24 (Wis. Ct. App. Nov. 28, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)) (review denied). Initial guardianship proceedings, however, do require medical testimony. *Id.* ¶ 23 (citing [Wis. Stat.](#) § 54.10(2)(b)2.).

4. Court Hearing [§ 7.15]

The hearing on a petition for protective placement or services must be held within 60 days after filing, unless a 45-day extension is requested by the individual, guardian ad litem, petitioner, or county department. [Wis. Stat.](#) § 55.10(1). In an unpublished opinion, the court of appeals held that the request for an extension of the time for the hearing could be implied from the conduct of the individual. *Constance N. v. Anna Mae Z. (In re Guardianship & Protective Placement of Anna Mae Z.)*, No. [2009AP795](#), 2010 WL 431663, ¶¶ 9–11 (Wis. Ct. App. Feb. 9, 2010) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

The petitioner must ensure that the individual to be protected attends the hearing, unless the guardian ad litem waives attendance and certifies in writing to the court the reasons why the individual is unable to attend. In making this determination, the guardian ad litem must personally interview the individual and consider the person’s ability to understand and meaningfully participate, the effect of attendance on the person’s physical or psychological health, and the individual’s expressed desires. If the person is unable to attend the hearing only because of residence in a nursing home or other facility, physical inaccessibility, or lack of transportation, the court must hold the hearing in a place where the individual can attend, if so requested by the individual, guardian ad litem, counsel, or other interested person. [Wis. Stat.](#) § 55.10(2). The assessment of the individual’s ability to attend must address the above-listed factors, because an incomplete waiver of appearance deprives the court of jurisdiction. *See Jefferson Cty. v. Joseph S. (In re Protective Placement with Guardianship of Joseph S.)*, [2010 WI App 160](#), [330 Wis. 2d 737](#), [795 N.W.2d 450](#); *Knight v. Milwaukee Cty. (In re Guardianship & Protective Placement of Muriel K.)*, [2002 WI App 194](#), ¶ 5, [256 Wis. 2d 1000](#), [651 N.W.2d 890](#) (concluding that guardian ad litem’s statements that proposed ward would get upset by physically attending hearing and that attendance was not in best interests did not equal “inability” to attend; guardian ad litem did not certify reasons for waiver in writing).

The attendance requirement applies to the entirety of the court proceedings. In *Joseph S.*, the court of appeals held that before the circuit court can order the individual’s removal from the courtroom because of disruptive behavior, the circuit court must explicitly warn a proposed ward that continued disruptive behavior could result in removal from the courtroom. [2010 WI App 160](#), ¶¶ 11–14, [330 Wis. 2d 737](#). The court of appeals determined that the circuit court had not given an adequate warning in *Joseph S.* Therefore, the court of appeals remanded the case to the circuit court to reconvene the final hearing at the point at which the judge had summarily removed the proposed ward from the courtroom for disruptive behavior and swearing. *Id.* ¶ 16.

Since the COVID-19 pandemic, when most in-court appearances were suspended (through May 21, 2021), Zoom or other remote appearances have persisted, including in guardianship and protective placement proceedings. The individual’s right to attend the hearing absent a valid waiver means in-person, physical attendance. Failure of a petitioning county to ensure the individual’s physical attendance at a hearing deprives the court of competency to proceed. *Racine Cty. v. P.B. (In re Guardianship of P.B.)*, [2022 WI App 62](#), ¶ 25, [405 Wis. 2d 383](#), [983 N.W.2d 721](#).

Court hearings must be open unless the individual or counsel requests that they be closed. [Wis. Stat.](#) § 55.10(3). The individual has the right to a jury trial and the individual, guardian ad litem, and legal counsel may present and cross-examine witnesses. [Wis. Stat.](#) § 55.10(4)(c). Interested persons do not have a statutory right to present and cross-examine witnesses, although a court in its discretion may allow interested persons to participate to the extent the court finds it appropriate and potentially helpful. *Coston v. Joseph P. (In re Guardianship & Conservatorship of Joseph P.)*, [222 Wis. 2d 1](#), [586 N.W.2d 52](#) (Ct. App. 1998); *see also* [Wis. Stat.](#) § 55.01(4) (defining *interested person* as an adult relative or friend of the person, an official or representative of an agency concerned with the person’s welfare, or a health-care agent).

Certain procedural requirements vary, depending on whether a hearing is contested or uncontested. *Joseph P.*, 222 Wis. 2d at 14–20 (citing *R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.)*, [162 Wis. 2d 197](#), [470 N.W.2d 260](#) (1991)). In particular, the testimony of the experts who prepared reports for the court proceedings is not required in uncontested hearings. The court can make its findings based on the written reports as long as there is no objection. An expert appointed to examine an individual in a guardianship and protective placement case cannot be a conduit for the professional opinions of others. Instead, the examining professional must reach that expert’s own conclusions through an independent evaluation of the proposed ward and the ward’s records. *Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.)*, [2003 WI App 223](#), ¶ 16, [267 Wis. 2d 310](#), [671 N.W.2d 377](#).

The standard of proof for the court to order protective placement or services is clear and convincing evidence. [Wis. Stat. § 55.10\(4\)\(d\)](#).

D. Disposition: Placement or Services [§ 7.16]

If the court finds that the person meets the standard for protective placement or services, it orders the county department to place the person or provide services. [Wis. Stat. § 55.12\(1\)](#). The court should designate where the placement should be. Placements must be made in the least restrictive environment consistent with the needs of the person and with the placement resources of the county department. [Wis. Stat. § 55.12\(3\)](#). The court may also order protective services as an alternative to protective placement or in addition to placement. [Wis. Stat. § 55.12\(8\)](#). For example, the court could find that the person should be placed into an adult family home but also needs protective services such as case management and vocational services. As with the standard for protective placements, protective services must be provided in the least restrictive manner consistent with the needs of the individual and the resources of the county department. [Wis. Stat. § 55.12\(3\)](#).

Placements may be made to a variety of residential settings, such as nursing homes, state centers for the developmentally disabled, CBRFs, supported apartments, adult family homes, and so forth. Placements cannot be made to acute-psychiatric-treatment facilities. [Wis. Stat. § 55.12\(2\)](#). It is possible for an individual to be protectively placed in a private home. *Id.*

In making a placement, or in deciding what services to provide, the court must consider the following factors: the needs of the person for health, social, or rehabilitative services; the level of supervision needed; the reasonableness of the placement or services, given the cost and actual benefits in the level of functioning to be realized by the person; the limits of available state and federal funds and county matching funds; and the reasonableness of the placement or services, given the number of persons needing protective placement or services and the availability of funds. *See* [Wis. Stat. § 55.12\(4\)](#). Counties cannot be required to provide county funding in addition to required matching dollars to protectively place a person or to provide a person with protective services. [Wis. Stat. § 55.12\(5\)](#).

In spite of the statutory funding limitations, counties must make individualized determinations of placement and service needs. A county must make an affirmative showing of a good-faith, reasonable effort to find and fund an appropriate protective placement, for example, by taking into consideration all the factors enumerated in [Wis. Stat. § 55.12\(4\)](#). *Dunn Cnty. v. Judy K. (In re Guardianship of Judy K.)*, [2002 WI 87](#), [254 Wis. 2d 383](#), [647 N.W.2d 799](#). Therefore, a county cannot simply assert that it has no funding for a placement and for that reason stop the inquiry. Nor should a county be able to assert that the person should stay in or be placed into an overly restrictive setting because of lack of funds for community services. Rather, the county should have to demonstrate that there are no available resources under various state, federal, county, and private funding sources.

Note. In multiple sections in [Wis. Stat. ch. 55](#), the phrase “the limits of available state and federal funds and of county funds required to be appropriated to match state funds” appears. [Wis. Stat. §§ 55.001, 55.045, 55.12\(4\), \(5\)](#). This language, commonly referred to as the *county shield law*, was inserted into [Wis. Stat. ch. 55](#) in response to (and thus superseded) the supreme court holding that county liability for paying for the least restrictive placement was not limited to that which could be paid from available state and federal funds and from funding appropriated by counties to match those funds. *D.E.R. v. La Crosse Cnty. (In re Protective Placement of D.E.R.)*, [155 Wis. 2d 240](#), [455 N.W.2d 239](#) (1990). Statewide implementation of Family Care and IRIS (which are funded entirely with state and federal funds) has rendered the county shield law largely superfluous, because counties have no fiscal involvement in these programs, and most people subject to protective placement are eligible for them.

If a petition for protective placement potentially involves a placement of a person with a developmental disability into an intermediate facility (excluding a state center for the developmentally disabled) or a nursing home, the county department must “develop a plan under [[Wis. Stat. § 46.279\(4\)](#)]” to serve that person in a noninstitutional community setting. The county department

must develop this plan within 120 days after a proposal is made to protectively place the individual, [Wis. Stat.](#) § 46.279(4)(c), and must give the plan to the individual's guardian and to the county agency overseeing protective placements. [Wis. Stat.](#) § 55.12(6). The court cannot place the individual into an intermediate facility or a nursing home unless it finds that such a placement is the most integrated setting appropriate to the needs of the individual, after taking into account information presented by all affected parties. *Id.* The statutes define *most integrated setting* as “a setting that enables an individual to interact with persons without developmental disabilities to the fullest extent possible.” [Wis. Stat.](#) § 46.279(1)(bm).

Note. As of July 1, 2018, CIP, the county-administered community-based program to which [Wis. Stat.](#) § 46.279 (by reference to [Wis. Stat.](#) § 46.278) purportedly applies, no longer exists. It has been replaced in every county in the state by the Family Care and IRIS programs, neither of which is administered by counties. *See supra* § 7.1; *infra* § 7.27. It is unclear which, if any, entity is required to provide the information required by [Wis. Stat.](#) § 55.12(6). As a practical matter, these cases seldom arise because there are so few remaining institutional facilities for people with developmental disabilities.

E. Disposition: Firearms Restrictions [§ 7.17]

The rights to possess firearms and ammunition of people adjudicated incompetent are substantially limited. [Wis. Stat.](#) § 55.12(10). The state limitations stem from 18 [U.S.C.](#) § 922(g)(4), which makes it unlawful for any person “who has been adjudicated as a mental defective or has been committed to a mental institution” to possess a firearm or ammunition. If the court determines that the prohibition under 18 [U.S.C.](#) § 922(g)(4) applies, a person under a guardianship or subject to a protective services or protective placement order is presumed to be unable to possess a firearm, and the court must order the individual not to possess a firearm as part of its guardianship or protective placement order. The court must further order the seizure of any firearm owned by the individual and inform the individual of the criminal penalties that could result if the person is ever found in possession of a firearm once the order has been entered. [Wis. Stat.](#) § 55.12(10)(a).

A protectively placed individual subject to a prohibition on possessing firearms may petition either the court that ordered the restriction or the court in the county in which the individual resides to have it cancelled. The court may grant the petition if it finds that “the circumstances regarding the protective services or placement order ... and the individual's record and reputation indicate that the individual is not likely to act in a manner dangerous to public safety and that the granting of the petition would not be contrary to public interest.” If the firearm-restriction order is cancelled, any firearm-seizure order is also cancelled, and the firearm must be returned to the ward. [Wis. Stat.](#) § 55.12(10)(b).

Whenever a firearm prohibition is imposed or cancelled, the clerk of court must notify the Wisconsin Department of Justice and provide sufficient identifying information to permit the department to update its firearms-background-check database. [Wis. Stat.](#) § 55.12(10)(d); *see* [Wis. Stat.](#) § 175.35(2g)(c); Form [GF-220](#) (Adjudication and Prohibited Possession of Firearms and Day Care License Restriction Report), Form [GF-221](#) (Adjudication and Prohibited Possession of Firearms Cancellation Report).

Similar restrictions (and a similar right to request cancellation of the restrictions) are imposed on individuals subject to involuntary commitment under [Wis. Stat.](#) ch. 51 ([Wis. Stat.](#) § 51.20(13)(cv)) and guardianship under [Wis. Stat.](#) ch. 54 ([Wis. Stat.](#) § 54.10(3)(f)). In many [Wis. Stat.](#) ch. 55 cases, the matter will be settled as part of the guardianship case.

Query. Although a person has a right to a hearing on a petition to cancel the possession restriction, it is unclear what procedure applies to such a hearing. One unanswered question is whether a guardian ad litem must be appointed at such a hearing. Another is whether the individual is entitled to court-appointed legal counsel either to bring the petition or to litigate it if the individual was self-represented when filing the petition.

V. Emergency Protective Services and Protective Placement [§ 7.18]

A. Protective Services [§ 7.19]

If it is necessary to enter premises forcibly to provide or investigate the need for emergency protective services, a staff member of the county department may do so if the person first obtains a court order authorizing such entry and if the person is accompanied by a sheriff, police officer, or member of a fire department. If it appears probable that substantial physical harm, irreparable injury, or death may occur, a sheriff, a police officer, or a firefighter may enter the premises without a court order if the time to get the order would result in greater risk of physical harm to the individual. [Wis. Stat.](#) § 55.13(4). Within 14 days after a forcible entry is made, the

person making the entry must give the court a report of the exact circumstances, including the date, time, place, factual basis for the need for the entry, and any services rendered. [Wis. Stat. § 55.13\(5\)](#).

A county protective services agency may provide emergency protective services, with or without a forcible entry, for up to 72 hours if there is reason to believe that the person will incur a substantial risk of serious physical harm if the services are not provided. [Wis. Stat. § 55.13\(1\)](#). If the agency providing the emergency protective services has reason to believe that the individual meets the criteria for court-ordered protective services, the agency may file a petition for such services. If the individual does not have a guardian, a petition for guardianship must also be filed. A probable-cause hearing must be held within 72 hours, exclusive of weekends and holidays. [Wis. Stat. § 55.13\(2\)](#). If the court finds probable cause that the individual may meet the standards for court-ordered protective services, it may order emergency protective services to be provided for up to 60 days pending the final hearing. [Wis. Stat. § 55.13\(3\)](#).

Counties must designate an agency to take reports and investigate allegations of abuse, neglect, self-neglect, or financial exploitation of adults at risk. [Wis. Stat. § 55.043\(1d\), \(1g\), \(1r\)](#); *see also* [Wis. Stat. § 55.01\(1e\)](#) (defining *adult at risk* as “any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect or financial exploitation”). [Wis. Stat. § 55.043\(4\)](#). Cases initiated in this way may involve emergency protective services and referrals to law enforcement officials or agencies with oversight over service providers. [Wis. Stat. § 55.043\(1r\)\(a\)1g.](#), relating to the duties of adult-at-risk agencies, *requires* such agencies to investigate (or refer to another agency for investigation) all reports of alleged abuse, financial exploitation, neglect, or self-neglect of an adult at risk. Before 2021 Wis. Act 122 added this requirement, adult-at-risk agencies had discretionary authority to investigate such reports. The amendment made the investigation requirement for adult-at-risk agencies consistent with the investigation mandate applicable to elder-adult-at-risk agencies under [Wis. Stat. § 46.90\(5\)](#). Although guardians ad litem play no role in these investigations, it is possible that more investigations will lead to additional formal [Wis. Stat. ch. 55](#) proceedings, resulting in increased opportunities for guardian ad litem appointments.

B. Protective Placement [§ 7.20]

Based on personal observation of, “or a reliable report by a person who identifies himself or herself to, a sheriff, police officer, fire fighter, guardian, if any, or authorized representative” of a county protective services agency, the person who made the observation or to whom the report was made may take an individual into custody when it appears probable that the individual is “so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious physical harm to himself or herself or others as a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities” if not immediately placed. [Wis. Stat. § 55.135\(1\)](#). The person may be transported to an appropriate medical or protective placement facility. *Id.* Each county protective services agency must designate at least one such facility for emergency protective placements. [Wis. Stat. § 55.02\(2\)\(b\)4](#).

Under [Wis. Stat. § 55.135\(1\)](#), upon arrival at the placement facility, the person must be notified orally and in writing of the person’s rights (such as the right to an attorney and the right to contact a member of the person’s immediate family), and the person making the placement must file a statement of the observations or reports that led to the emergency placement. A petition for protective placement must then be filed with the court, and a hearing must be held within 72 hours (excluding weekends and holidays) to determine whether there is probable cause to believe the standards for protective placement will be found. [Wis. Stat. § 55.135\(4\)](#). If the probable-cause hearing is not held within 72 hours after the person is taken into custody, the court loses competence to adjudicate a person’s need for protective placement. This time limit requirement cannot be avoided by filing a new petition for protective placement after the 72-hour time period has run. *Kindcare, Inc. v. Judith G. (In re Protective Placement, with Guardianship, of Judith G.)*, [2002 WI App 36](#), [250 Wis. 2d 817](#), [640 N.W.2d 839](#).

If the court finds probable cause, the person may be held for up to 30 days pending a final court hearing on the protective placement. [Wis. Stat. § 55.135\(5\)](#). The court may also determine that civil commitment is more appropriate for the person than protective placement and switch the proceedings to those under [Wis. Stat. § 51.20 or 51.45\(13\)](#). [Wis. Stat. § 55.135\(4\)](#); *see infra* [ch. 8](#) (relationship of civil commitment to protective placement and procedures involved in switching from one to the other). Finally, the court may determine that the person does not need to be in a placement facility during the 30 days and instead order protective services, perhaps in the person’s own home. [Wis. Stat. § 55.135\(5\)](#).

The court of appeals has held that a circuit court lacks competence to proceed if the final hearing is not held within 30 days after the probable-cause hearing. In such circumstances, the petition must be dismissed. *N.N. v. County of Dane (In re Guardianship of*

N.N.), [140 Wis. 2d 64](#), [409 N.W.2d 388](#) (Ct. App. 1987). In another case, the court of appeals held that the successive dismissals and refiling of petitions for commitment and protective placement denied due process of law to the person who was the subject of the petitions. *State ex rel. Sandra D. v. Getto*, [175 Wis. 2d 490](#), [498 N.W.2d 892](#) (Ct. App. 1993). The circuit court had twice dismissed the proceedings in that case because the examining physicians failed to file their reports in a timely manner. After each dismissal, a new petition was immediately filed, which, the court of appeals observed, had the effect of impermissibly extending the person's period of detention to 63 days without a final hearing. *Id.* at 498–99.

If the court finds probable cause of the grounds for protective placement for a person with a developmental disability who is temporarily placed in an intermediate facility or a nursing home, at the final hearing the court may extend the placement for up to an additional 90 days to enable the county to develop a plan for noninstitutional community placement. [Wis. Stat. § 55.135\(5\)](#).

VI. Role of the Guardian ad Litem in Initial Protective Services or Protective Placement Proceedings [§ 7.21]

A. Overview of Statutory Requirements [§ 7.22]

The guardian ad litem in an initial protective services or protective placement proceeding has essentially the same statutory duties as a guardian ad litem in a guardianship case. [Wis. Stat. § 55.10\(4\)\(b\)](#), incorporating [Wis. Stat. § 54.40\(4\)](#). These include the following:

1. Interviewing the individual and informing the individual about the nature of the proceeding and to advise the individual, orally and in writing, of the right to be present at the hearing, to have a jury trial, to appeal, to be represented by counsel, and to have an independent evaluation;
2. Interviewing the proposed guardian and making a recommendation regarding suitability to be appointed;
3. Interviewing an existing guardian in regard to the protective services or protective placement case;
4. Notifying the guardian of the right to be present at and participate in the hearing, to present and cross-examine witnesses, to receive a copy of the comprehensive evaluation and any independent evaluation under [Wis. Stat. § 55.11\(1\) or \(2\)](#), and to secure and present a report on any additional independent evaluations;
5. Reviewing any advance planning for financial or health-care decisions, including any power of attorney for health care and durable power of attorney for finances and property and interviewing any agents appointed under these documents;

Note. [Wis. Stat.](#) ch. 52, “Supported decision-making agreements,” provides a formal, state-sanctioned means by which a person with a functional impairment may designate a “supporter” to assist “in understanding the options, responsibilities, and consequences of that person’s life decisions.” [Wis. Stat. § 52.10\(1\)\(a\)](#). The law does not confer decision-making authority on the supporter. Courts must consider supported decision-making agreements when deciding whether there are other, less restrictive alternatives to guardianship before entering a guardianship order for an individual. [Wis. Stat. § 54.10\(3\)\(a\)4](#). Thus, a guardian ad litem should also review any supported decision-making agreement the person has executed.

6. Informing the court and the petitioner or petitioner’s counsel if the individual requests representation by legal counsel;
7. Requesting the court to order any additional medical, psychological, or other evaluation;
8. Informing the court and the petitioner or petitioner’s attorney that the individual objects to the finding of incompetency, the proposed placement, or the guardian ad litem’s recommendation regarding the individual’s best interests, or that the individual’s position on these matters is ambiguous;
9. Informing the court of the individual’s request for a jury trial;
10. Making a recommendation to the court regarding whether the hearing should be held in a place other than the courtroom;

11. Determining whether attendance of the person at the hearing should be waived and, if so, certifying to the court the specific reasons why the person is unable to attend;
12. Attending all hearings if the individual does not have legal counsel, unless the court excuses a personal appearance based on the guardian ad litem's written report to the court;
13. Presenting evidence concerning the best interests of the individual; and
14. Reporting to the court on any matter that the court requests.

[Wis. Stat.](#) §§ 55.10(2), (4)(b), (c), 54.40(4).

The guardian ad litem must be an attorney and must not be (1) an interested person in the proceeding, (2) counsel for a party in the proceeding, (3) a relative of an interested person in the proceedings, or (4) a representative of an interested person in the proceedings. [Wis. Stat.](#) § 54.40(2). In addition, Wisconsin attorneys serving as guardians ad litem for adults in cases under [Wis. Stat.](#) ch. 51, 54, or 55 must (1) obtain 30 hours (total over a lifetime) in continuing legal education courses approved for this purpose, (2) obtain six hours in the combined current reporting period and immediately preceding reporting period, or (3) be specially appointed by a judge based on exceptional or unusual circumstances or on the judge's belief that the guardian ad litem is otherwise qualified to represent the individual's best interests. *Id.*; [SCR](#) ch. 36. The guardian ad litem must function independently and in the same manner as the attorney to the action. [Wis. Stat.](#) § 54.40(3).

The guardian ad litem is to be an advocate for the best interests of the individual and is not bound by the wishes of the individual or others. However, while the guardian ad litem is not bound by the wishes of the individual, the guardian ad litem is to consider the individual's wishes in making recommendations. *Id.*

In an action involving a jury trial, either the court or the guardian ad litem may tell the jury that the guardian ad litem represents the best interests of the individual. [Wis. Stat.](#) § 54.40(5).

The guardian ad litem may initiate an appeal, participate in an appeal, or do neither. If a guardian ad litem chooses not to participate in an appeal initiated by another party, the guardian ad litem must file with the appellate court a statement of reasons for not participating. The appellate court may then order the guardian ad litem to participate even though the guardian ad litem initially chose not to do so. [Wis. Stat.](#) § 54.40(6).

If a guardianship proceeding is combined with the protective services or protective placement proceeding, generally one guardian ad litem is appointed to perform all the necessary functions. For a discussion of guardianship proceedings and the role of the guardian ad litem in them, see [chapter 6](#), *supra*.

B. Carrying out the Statutory Requirements [§ 7.23]

1. Conducting Interviews and Gathering Additional Information [§ 7.24]

a. Interviewing [§ 7.25]

Upon appointment in a [Wis. Stat.](#) ch. 55 case, the guardian ad litem must visit the person and explain the nature of the proceeding and all of the person's rights. *See supra* § 7.22. This should be done in simple language and in a way to ensure that the individual understands, to the best of their ability, what is happening to them. A written notice of rights must also be prepared and left with the person, and similarly should be written in language that a layperson could understand. At these interviews, the guardian ad litem should also try to learn about the person, by determining how aware the person is of the surroundings; how alert the person is; whether the person's thinking or memory is impaired; how long the person has lived at the present residence; what the person's life experiences (education, work, family) have been; where the person wants to live; and what the person does during the day. *See supra* [ch. 5](#) (information on interviewing a person with mental disabilities).

Before or after visiting a person, the guardian ad litem should review any existing treatment records that are maintained by the county department. If a person presently resides in a facility, the guardian ad litem should also review any existing treatment records

maintained by that facility. *See supra* [ch. 5](#) (further information on checking files and records).

The guardian ad litem should also talk with close family members or friends, including a citizen advocate, if any, to see what their hopes and expectations for the person are. They also may be an excellent source of information about what the person can do and what the person's living arrangements, service needs, and experiences have been to date. Service providers, such as a special education teacher, a group home staff member, a visiting nurse, or others who have had close contact with the person, also may be very good sources of information. The key is to develop a picture of what the person is capable of doing and what kind of support system the person needs. For additional information on identifying significant people in the lives of persons with mental disabilities, and on the nature of mental disabilities and on service needs and support systems, see [chapter 5](#), *supra*.

The guardian ad litem must also interview any proposed guardian regarding the suitability of this person to serve as guardian. [Wis. Stat.](#) § 54.40(4)(c). If a guardian has already been appointed, the guardian ad litem must interview the guardian regarding the protective services or protective placement proceeding. [Wis. Stat.](#) § 55.10(4)(b). The guardian may have a good deal of information about the service needs of the individual and may have strong views about where the person should be placed or the type of services the person should receive. The guardian ad litem may consider this information when determining what is in the person's best interests but should not be bound by the wishes of the guardian. *See* [Wis. Stat.](#) § 54.40(3).

In addition, the guardian ad litem must review any power-of-attorney-for-health-care or durable-power-of-attorney documents and interview any agents appointed under these documents. [Wis. Stat.](#) § 54.40(4)(d); *see* [Wis. Stat.](#) chs. 155, 244. While information gained from this review may be most relevant to the issue of the individual's need for a guardian, it may also be useful in regard to the individual's placement and service needs. Health-care agents may have excellent insight into what the individual actually wants, what resources are available, and what the person needs. Also, it is possible that the health-care agent will retain authority over health-care decisions even though a guardian has been appointed. *See* [Wis. Stat.](#) § 155.60(2) (providing that power of attorney for health care remains in effect unless court, for good cause, revokes power or limits agent's authority). This may be particularly true when a guardian is appointed under [Wis. Stat.](#) ch. 54. *See* [Wis. Stat.](#) § 54.46(2)(b) (providing that power of attorney for health care remains in effect unless court, for good cause, revokes power or limits agent's authority).

Note. The COVID-19 virus may continue to affect the ability of guardians ad litem to do their jobs in [Wis. Stat.](#) ch. 55 proceedings. Because variants of the COVID-19 virus continue to cause new infection and reinfection, guardians ad litem should monitor updates to and carefully abide by all U.S. Centers for Disease Control and Prevention and DHS recommendations for infection prevention when meeting with individuals in facilities.

Because of COVID-19, it might not be possible for a guardian ad litem to conduct an in-person interview. [Wis. Stat.](#) ch. 55 does not specifically require the guardian ad litem interview be done in person, but an in-person interview is the typical and preferred practice. In some cases, teleconferencing or videoconferencing with the person might not yield the information the guardian ad litem needs to make the report to the court. If the guardian ad litem is having difficulty fulfilling required duties, the guardian ad litem should notify the court about the difficulty and seek guidance on how to proceed.

b. Requesting and Reviewing Evaluations [§ 7.26]

If the picture is particularly unclear regarding the individual's service and placement needs, the guardian ad litem may want to ask the court to appoint certain people to be involved in conducting the comprehensive evaluation under [Wis. Stat.](#) § 55.11(1). For example, if the person has a disability such as an autism spectrum disorder or a condition such as Alzheimer's disease that requires certain specialized care, then it is extremely important to involve professionals who understand the condition and who have experience in developing care and treatment approaches for it. It is also important to realize that, for many elderly or disabled persons, the most relevant evaluator may be a social worker, a nurse, or a teacher, and not necessarily a physician or a psychologist; experience in working with the type of person who is being evaluated and in designing and implementing community services plans is the key element.

Persons who do evaluations and service planning can be found in the county department; in private agencies, such as visiting nurse services; in public or private agencies providing community residential services or community support programs; at public and private higher-educational institutions; at the DHS; and in private practice. Funds for assessments may be available from the Medicaid program. For additional information on these programs and for additional information on desirable evaluations and obtaining them, see [chapter 5](#), *supra*.

It is also a good idea for the guardian ad litem to contact the people who are doing the comprehensive evaluation under [Wis. Stat. § 55.11\(1\)](#) to discuss their recommendations for placement or services. If their recommendations do not seem to align with the person's or family's goals, with the guardian ad litem's position as to the person's best interests, or with the information obtained from other sources, the guardian ad litem may wish to request an additional evaluation. If the individual (or anyone on the individual's behalf, including the guardian ad litem) requests it, the individual has the explicit right to an independent comprehensive evaluation in a [Wis. Stat. ch. 55](#) proceeding. [Wis. Stat. § 55.11\(2\)](#). The guardian ad litem also has the authority to request additional evaluations. [Wis. Stat. § 54.40\(4\)\(e\)](#). Also, witnesses may be presented at the hearing, and the guardian ad litem may want to present information on service recommendations that are different from those being presented by the court-ordered evaluators. See [chapter 5, supra](#), for a discussion of long-term support services available in Wisconsin.

c. Evaluating Potential Placement Resources and Plans [§ 7.27]

Historically, two Medicaid programs designed to support people in home and community-based settings, COP and CIP, assigned counties with responsibility for creating community-support plans for elderly people and people with disabilities and for paying for services under those plans. [Wis. Stat. §§ 46.27, 46.275, 46.277, 46.278](#) (2017–18); *cf.* 2019 Wis. Act 9 (repealing [Wis. Stat. § 46.27](#) (COP) and removing related cross-references from [Wis. Stat. §§ 46.275, 46.277, 46.278](#)). The principal disadvantage of these programs was that their enrollments were capped, meaning not all people who qualified for them were able to access them. Thus, in a county in which all available COP and CIP funds had been allocated, there was no obvious source of funding to support a community placement ordered by a [Wis. Stat. ch. 55](#) court. By contrast, nursing home stays were generally covered for all Medicaid recipients who qualified for them. This funding-source inequity created friction between counties and people subject to protective placement for whom the least restrictive placement was a CBRF.

Over more than a decade, those county-based programs were gradually replaced by the Family Care and IRIS programs, with Wisconsin's last county adopting Family Care in July 2018. See Wis. DHS, *Family Care*, <https://www.dhs.wisconsin.gov/familycare/index.htm> (last revised Sept. 17, 2024). Family Care and IRIS, unlike the programs they replaced, are Medicaid entitlement programs, meaning that everyone who qualifies for them will receive services from them. To be sure, participation in Family Care and IRIS comes with the programs' own set of problems (not the least of which is whether the services provided are, in fact, adequate to meet the least-restrictive, most-integrated setting mandates). But, from a purely fiscal perspective, Family Care and IRIS potentially eliminate the institutional bias that often pervaded protective placement disputes.

As noted in section [7.1, supra](#), [Wis. Stat. ch. 55](#) has not been updated to incorporate the state's transition to Family Care and IRIS and reflects only the old system under CIP and COP. There is, therefore, no statutory connection between [Wis. Stat. ch. 55](#) and either the Family Care or IRIS programs, because neither program is administered by a county. Family Care plans are developed by MCOs that contract with the state on a regional basis. IRIS plans are developed by the IRIS participant and by the participant's guardian with the assistance of an IRIS consultant agency, a private entity. Services in Family Care are delivered by the MCO's network of providers. IRIS participants individually contract with providers for the services they need.

The absence of a statutory connection notwithstanding, the DHS contract with its Family Care MCOs requires those entities to "provide for court-ordered services and treatment if the service is a benefit package service for which the MCO would be the primary payer and the member has been court ordered into placement or to receive services through [Wis. \[Stat.\] chs. 51, 54 or 55](#)." Wis. DHS, *[Family Care] Contract Between Wis. Dep't of Health Servs., Div. of Medicaid Servs. and [MCO] § VII.M.2.* (issued Jan. 1, 2024), <https://www.dhs.wisconsin.gov/familycare/mcos/fc-fcp-2024-contract.pdf> (model contract). The Family Care and IRIS programs cover a wide range of supportive services, including supportive home care, daily living skills training, consultative and therapeutic resources, transportation, supported employment, and home modifications. The Family Care program and, to a much lesser extent, the IRIS program, cover the cost of placement in substitute care facilities (CBRFs and adult family homes).

Processes, participant rights, and due-process protections for Family Care recipients are at [Wis. Stat. §§ 46.2804–2895](#) and [Wis. Admin. Code ch. DHS 10](#). The few statutory references to the IRIS program include those found at [Wis. Stat. §§ 46.2805\(10m\), 46.2897, 46.2898, and 46.2899](#). No administrative code provisions relating to the IRIS program have been promulgated. The policies and procedures governing the IRIS program are found on the DHS website at <https://www.dhs.wisconsin.gov/iris/index.htm> (last revised Oct. 1, 2024).

Note. Two agencies independent of the DHS have contracts to provide advocacy services to people participating in Family Care or IRIS. For issues involving people under age 60, the Family Care IRIS Ombudsman Program at Disability Rights Wisconsin

may be contacted at (800) 928-8778. For issues involving people 60 years old or older, the Board on Aging and Long Term Care's ombudsman may be contacted at (800) 815-0015. Guardians ad litem can also contact these agencies if they have questions regarding the Family Care or IRIS programs.

The language in [Wis. Stat. § 55.12\(4\)](#) and (5) that limits the county's obligation to fund protective placements is still relevant to protective placements that involve people who are not eligible for Family Care or IRIS. For the most part, these are younger people who have only a mental health condition and no other disabilities that might prompt a need for a protective placement. For these cases, the guardian ad litem may also have to become familiar with the various state and federal funding resources that are available and the county's utilization of these resources. For example, if the experts recommend community placement for a person, but the county refuses to consider it, claiming lack of resources, the guardian ad litem should work with the experts to identify possible state or federal funding sources. The guardian ad litem then should ask the county, and perhaps the DHS, about the county's actual utilization of the identified state and federal resources. Frequently there are specialized funds that have not been fully used, and some counties return human services money to the state. For more information on funding resources, see [chapter 5](#), *supra*.

Given the supreme court's ruling in *Dunn County v. Judy K. (In re Guardianship of Judy K.)*, [2002 WI 87](#), [254 Wis. 2d 383](#), [647 N.W.2d 799](#); see *supra* § [7.16](#), placing an affirmative duty on the county to make a good-faith, reasonable effort to find and fund an appropriate placement, it is especially important that the guardian ad litem have familiarity with the various funding and placement resources that may be available to the county. The guardian ad litem may want to file a discovery motion requiring the county to fully disclose all its funding resources and options and the steps it has taken to find and fund a placement that takes into account all the factors in [Wis. Stat. § 55.12\(3\)](#), (4), (5), and (6).

Finally, the county department must develop a plan for a noninstitutional community placement for persons with developmental disabilities who are being considered for placement into an intermediate facility (other than a state center for the developmentally disabled) or a nursing facility. [Wis. Stat. § 46.279\(4\)](#). The guardian ad litem should carefully review this plan to determine whether the needs of the individual have been adequately addressed. The statutes also promote noninstitutional placements by providing that a court must not protectively place a person with a developmental disability into an intermediate facility or a nursing home unless it explicitly finds that such a setting is "the most integrated" setting appropriate to the needs of the individual. [Wis. Stat. § 55.12\(6\)](#).

Note. Since the advent of Family Care and IRIS, cases involving this requirement are quite uncommon.

d. Assessing Need for Psychotropic Medications [§ 7.28]

In proceedings for court orders for the involuntary administration of psychotropic medication, the guardian ad litem's role may be somewhat different. The statute requires the guardian ad litem to report to the court whether the allegations in the petition for court-ordered medication are true and whether involuntary administration of the medication is in the person's best interests. [Wis. Stat. § 55.14\(5\)](#). In determining whether the allegations in the petition are true, the guardian ad litem will need to meet with the person and assess whether the person in fact refuses to take the medication voluntarily or whether involuntary administration is not feasible or not in the person's best interests. [Wis. Stat. § 55.14\(3\)\(c\)](#). In some situations, the court order may be sought for a younger person with serious and persistent mental illness who has a guardian but who also has strong opinions about taking different medications based on personal experience. Thus, it may be that the person refuses to take a particular medication but is willing to take an alternative medication. In this situation, a court order might not be needed or appropriate.

The guardian ad litem will also need to review the person's medical record and the physician's statement attached to the petition. See [Wis. Stat. § 55.14\(4\)](#). The standard requires that a physician has prescribed the medication, the individual's condition is likely to improve with the medication, and the individual is likely to respond positively to the medication. [Wis. Stat. § 55.14\(3\)\(a\)](#), (d). There should be documentation in the medical record or the physician's statement regarding these issues. In addition, the court must find that the person is not competent to refuse medication. [Wis. Stat. § 55.14\(3\)\(b\)](#). This standard requires that someone, preferably a medical professional, has explained the advantages and disadvantages of and alternatives to the medication to the person and the person is incapable of expressing an understanding of this information or is substantially incapable of applying the information to the person's condition to make an informed choice about accepting or refusing the medication. [Wis. Stat. § 55.14\(1\)\(b\)](#). Again, there should be documentation about the attempt to explain this information and about the individual's ability to understand or apply the information. The guardian ad litem, with the person, may also need to discuss the person's understanding of the advantages and disadvantages of and alternatives to the medication to determine whether the person appears to meet the standard for not being competent to refuse the medication.

The standard also requires a finding of a substantial probability of physical harm, impairment, injury, or debilitation to the individual or substantial probability of physical harm to others. [Wis. Stat.](#) § 55.14(3)(e). This substantial probability of harm must be based on (1) evidence that the person meets one of the commitment standards under [Wis. Stat.](#) § 51.20(1)(a)2.a.–e.; or (2) the individual’s history of at least two episodes, one of which occurred in the immediately preceding 24 months, that indicate a pattern of overt activity, attempts, threats, or omissions that resulted from the person’s failure to participate in treatment and that resulted in a finding of probable cause for commitment, a settlement agreement, or a civil commitment order under [Wis. Stat.](#) ch. 51. Thus, the guardian ad litem will need to review the evidence of past findings, settlements, or orders under [Wis. Stat.](#) ch. 51 or the information providing the basis for the allegation that the person currently meets one of the commitment standards.

Court-ordered medication has both significant risks and potential benefits. If used carefully, it can help stabilize a person’s condition and allow the person to enter an outpatient treatment program. The requirement that the county department ensure that the services in the treatment plan are actually provided, [Wis. Stat.](#) § 55.14(8)(a), can be quite helpful in this era of limited resources. However, the provision can also be abused: persons who are mentally ill but who have valid reasons for refusing treatment can be ordered to participate in treatment programs. Thus, the guardian ad litem must be particularly vigilant in ensuring that the person’s best interests are protected.

2. Making Requests to the Court [§ 7.29]

The guardian ad litem has the obligation to request that the court order additional medical, psychological, or other evaluations, if necessary. [Wis. Stat.](#) § 54.40(4)(e). Thus, if at the interview the person appears to be lucid and articulate and the guardian ad litem questions the physician’s or psychologist’s report concerning competency, the guardian ad litem should request that the court order an additional psychological evaluation. Likewise, if the person appears capable of living outside an institutional setting, but the placement recommendation is for a nursing home, the guardian ad litem should request additional evaluation regarding the placement issue.

The guardian ad litem must inform the person of the right to counsel, [Wis. Stat.](#) § 54.40(4)(a), (b), and the court must appoint counsel if the person requests it or if the guardian ad litem reports that the person is opposed to the proceeding for guardianship or protective placement or services. [Wis. Stat.](#) § 55.10(4)(a). Thus, if the person tells the guardian ad litem that the person wants advocacy counsel or is opposed to the proceedings, the guardian ad litem must report this to the court and should request that counsel be appointed. *See* [Wis. Stat.](#) § 54.40(4)(g).

If the guardian ad litem determines that the person desires to attend the hearing but is unable to attend because the person resides in a nursing home or other facility, the proposed location of the hearing is physically inaccessible, or the person lacks transportation, the guardian ad litem should request that the hearing be held in a place where the person is able to attend. [Wis. Stat.](#) § 55.10(2). This request should be made as soon as possible. [Wis. Stat.](#) § 54.40(4)(f); *see also infra* § 7.30 (attending the hearing).

The individual has a right to a jury trial if requested by the guardian ad litem, the individual, or counsel. [Wis. Stat.](#) § 55.10(4)(c). Thus, if the individual makes such a request to the guardian ad litem, then the guardian ad litem must report this to the court.

3. Attending the Hearing [§ 7.30]

It is presumed that the individual will attend the hearing unless the guardian ad litem, after a personal interview, waives attendance and certifies in writing to the court the reasons why the person is unable to attend. The guardian ad litem must consider the person’s ability to understand and meaningfully participate, the effect of attendance on the individual’s physical or emotional health in relation to the importance of the proceeding, and the individual’s expressed desires. If the individual will attend the hearing, it is the responsibility of the petitioner to ensure such attendance; in other words, the petitioner must arrange transportation for the individual. The guardian ad litem may need to monitor this situation to make sure the petitioner understands this responsibility and follows through. Also, as stated above, if the inability to attend is based on the person’s residence, inaccessibility of the courtroom, or lack of transportation, the guardian ad litem should request the court to hold the hearing in a place where the person can attend. [Wis. Stat.](#) § 55.10(2). If a guardian ad litem’s waiver of attendance does not satisfy statutory requirements, the court lacks competence to proceed on the petition for protective placement. *Jefferson Cnty. v. Joseph S. (In re Protective Placement with Guardianship of Joseph S.)*, 2010 WI App 160, ¶ 5, 330 Wis. 2d 737, 795 N.W.2d 450.

The guardian ad litem must attend the hearing if the individual is not represented by counsel. [Wis. Stat.](#) § 55.10(4)(b). The guardian ad litem must prepare a written report if the court excuses the guardian ad litem's attendance. *Id.*; see Form [GN-3160](#).

4. Making Reports and Recommendations [§ 7.31]

As in other areas of guardian ad litem work, negotiation with petitioning counsel, defense counsel, the person's Family Care MCO interdisciplinary team, service providers, the person, the person's guardian, and the person's family is another important component of the guardian ad litem's role. Working with all the parties involved to work out a service plan to propose to the court is probably the most effective method of obtaining needed and desired services. Once the guardian ad litem has a fairly clear idea of the guardian ad litem's position, these other key actors should be contacted to see whether agreement exists about whether protective placement or services, or both, should be ordered and, if so, what kind of placement or services is most appropriate for the person.

If agreement can be reached between the guardian ad litem and the involved parties, then a stipulation should be drawn up for presentation to the court. In some counties, this may be a written stipulation; in others, it is an oral report to the court, on the record. If agreement is not possible, then the guardian ad litem must prepare to present the guardian ad litem's report to the court. The guardian ad litem may prepare a written report and must do so if not planning to attend the hearing. See [Wis. Stat.](#) § 55.10(4)(b). If planning to attend the hearing, the guardian ad litem should again meet with the subject of the petition before the proceedings so that the guardian ad litem can learn whether there have been any changes in the circumstances. At the hearing, the guardian ad litem will be asked to make an oral report on what is in the person's best interests. The guardian ad litem may also introduce evidence, call witnesses, and cross-examine witnesses. If the guardian ad litem believes that certain services or a certain placement would be best for the person, this position should be expressed clearly and forcefully.

The most appropriate placement or services might not be immediately available. In this circumstance, the guardian ad litem should seek a court order setting forth the placement and services that are needed, a definite time frame for achieving them, and a requirement that periodic reports be made to the court. See *infra* § [7.46](#) (further information on role of guardian ad litem in evaluating alternative placements); see also *supra* [ch. 5](#) (court authority to order counties to provide needed placement and services).

5. Determining Extent and Termination of Appointment [§ 7.32]

To monitor progress with the court's order, the guardian ad litem should request clarification as to whether the guardian ad litem's appointment continues. [Wis. Stat.](#) § 54.40(6) clarifies that the appointment of a guardian ad litem in a [Wis. Stat.](#) ch. 55 proceeding terminates upon entry of the court's final order or upon termination of any appeal in which the guardian ad litem participates. The court may extend the appointment, or reappoint a guardian ad litem whose appointment has terminated, by an order specifying the scope of responsibilities of the guardian ad litem. Also, at any time, the guardian ad litem, any party, or the person for whom the appointment has been made may request that the court terminate any extension or reappointment. [Wis. Stat.](#) § 54.40(6). The Judicial Council note to the predecessor to [Wis. Stat.](#) § 54.40(6), see [Wis. Stat.](#) § 880.331(7) (1989–90), clarified that an appointment from an initial [Wis. Stat.](#) ch. 55 proceeding could be extended until the annual review or another review. See Wis. Sup. Ct. Order, 151 Wis. 2d xxv, xxxvii (1989). However, this must be done expressly by the court, and the scope of the guardian ad litem's duties must be spelled out. *Id.*

C. Working with Defense Counsel [§ 7.33]

According to [Wis. Stat.](#) § 55.10(4)(a), if a person requests defense counsel at least 72 hours before the hearing, if the person is protesting the protective placement, or if the court determines that counsel is needed in "the interests of justice," the person has a right to counsel. Also, all proceedings for court orders for involuntary administration of psychotropic medication require the appointment of counsel. [Wis. Stat.](#) §§ 55.14(7), 55.10(4)(a). If the person is unable to obtain legal counsel, the court must refer the person to the public defender for the appointment of counsel without an indigency determination. [Wis. Stat.](#) §§ 55.10(4)(a), 55.105.

Once defense counsel is appointed, the guardian ad litem's role may become more difficult. Defense counsel is supposed to represent the person's *wishes*, while the guardian ad litem is supposed to represent the person's *best interests*. In some cases, the two will be the same; in others, they will not be. Whether the guardian ad litem should remain in the case once defense counsel has been appointed is an issue that may arise. However, if the guardian ad litem is seen as representing what is in the person's best interests and acting as an arm of the court, the ongoing independent role for the guardian ad litem is evident. The role of the guardian ad litem is particularly important when the person is incompetent and may have difficulty making decisions and articulating a position.

In situations in which the individual has both a guardian ad litem and defense counsel, they should communicate about and determine the issues on which they agree and disagree. If an independent evaluation seems advisable, the guardian ad litem may want to consult with defense counsel to see whether defense counsel is also planning to request an evaluation. If so, it may be better to have one coordinated request presented to the court rather than multiple requests. If defense counsel is relatively inexperienced in this area of law, the guardian ad litem may want to offer assistance about how to obtain an evaluation, where to learn about services, and so forth. [Wis. Stat.](#) § 55.10(4)(b) states that the person must have a guardian ad litem present at the hearing if the person does not have defense counsel. [Wis. Stat.](#) § 54.40(6) clarifies that the guardian ad litem's appointment does not terminate until entry of the final order or the termination of any appeal in which the guardian ad litem participates, even if defense counsel has been appointed for the person.

The individual has a right to have defense counsel present at all interviews with the guardian ad litem. *Jennifer M. v. Maurer (In re Guardianship of Jennifer M.)*, [2010 WI App 8](#), ¶ 11, 323 Wis. 2d 126, [779 N.W.2d 436](#).

In situations in which there is a dispute between the guardian ad litem and defense counsel as to the individual's attendance, the recommendation of the guardian ad litem controls. *Dane Cnty. Dep't of Hum. Servs. v. Daniel L.C. (In re Guardianship & Protective Placement of Daniel L.C.)*, No. [2012AP400-FT](#), 2012 WL 3205574, ¶ 6 (Wis. Ct. App. Aug. 9, 2012) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

Note. The court of appeals ruled that an attorney who acted as adversary counsel in a civil commitment action under [Wis. Stat.](#) ch. 51 that was later converted to a [Wis. Stat.](#) ch. 55 protective placement action could not be appointed as the person's guardian ad litem in the [Wis. Stat.](#) ch. 55 case. *Tamara L.P. v. County of Dane (In re Guardianship & Protective Placement of Tamara L.P.)*, [177 Wis. 2d 770](#), [503 N.W.2d 333](#) (Ct. App. 1993). The court reasoned that there was a substantial relationship between the two proceedings and that the attorney might have to take a position as guardian ad litem that was opposed to a position the attorney took as adversary counsel.

D. Obtaining Payment of Fees and Costs [§ 7.34]

1. Guardian ad Litem Fees [§ 7.35]

Guardian ad litem fees must be paid by the ward if the ward has the resources to do so. [Wis. Stat.](#) § 757.48(2). For most persons with an estate, the court can order payment out of the available funds.

For persons who are indigent, the county can be ordered to pay the guardian ad litem fees. [Wis. Stat.](#) §§ 55.10(4)(b), 54.46(3)(b). Although there is no statutory definition of indigency, persons receiving Supplemental Security Income (SSI) are often considered to be indigent. Nonetheless, they may have a personal needs account with sufficient funds to pay the guardian ad litem fees. The determination of availability of funds, however, needs to be made on a case-by-case basis. The representative payee or guardian may use the funds from a personal needs account to pay guardian ad litem fees only if all current and future personal needs of the ward are adequately provided for. See 20 [C.F.R.](#) § 416.640 (describing permissible use of SSI benefit payments). Examples of personal needs are clothing, toiletries, special medical expenses, recreational activities, room furnishings, etc. The court cannot order attachment of funds from such an account to pay guardian ad litem fees; the determination as to their availability must be made by the payee or guardian. 42 [U.S.C.](#) § 407; [Wis. Stat.](#) §§ 815.18(3)(ds), 49.96.

If the person being protectively placed is a minor, the parents are liable for payment of the guardian ad litem fees as provided in [Wis. Stat.](#) § 48.235(8). Under this provision, the guardian ad litem may also file a motion requesting that the parents pay the fees of an expert witness used by the guardian ad litem. If the parents are indigent, the court may order the county where the hearing is held to pay the guardian ad litem and expert fees. The court may order the parents to reimburse the county. See [Wis. Stat.](#) § 55.10(4)(b).

2. Petitioner's Fees and Costs [§ 7.36]

The court may order that the ward's estate pay the petitioner's costs and attorney fees unless the court finds it inequitable to do so. In making this determination, the court must take into consideration the following: the ability of the person's estate to pay the fees and costs, any conflict that the petitioner may have had in pursuing the protective placement or services, whether the proceeding was contested, and whether the individual had a power of attorney for health care or durable power of attorney for finances and property.

or had engaged in other advance planning to avoid protective placement or protective services. [Wis. Stat. § 55.075\(4\)\(a\)](#). In the role of advocate for the person's best interests, the guardian ad litem should monitor this process to ensure that the ward's estate is not being charged when it would be inequitable to do so.

VII. Annual Reviews [§ 7.37]

A. Background of Annual Reviews of Protective Placement Orders [§ 7.38]

The supreme court held in *State ex rel. Watts v. Combined Community Services Board*, [122 Wis. 2d 65](#), [362 N.W.2d 104](#) (1985), that every person under protective placement is entitled to an annual review of the placement by a guardian ad litem and by a court. Previously, there had to be a review by only the county protective services agency, which filed a copy of the review with the court. See [Wis. Stat. § 55.06\(10\)\(a\)](#) (1983–84).

Specifically, the court held that a guardian ad litem must be appointed annually for each protectively placed person. Under *Watts*, the guardian ad litem must visit the person and inform the person of the right to have a full due-process hearing on whether the person continues to meet the standards for protective placement and whether the current placement is in the least restrictive environment consistent with the person's needs. The person must also be informed of the right to have legal counsel appointed and to have an independent evaluation. The guardian ad litem must review the protective services agency's annual report and must contact the guardian to obtain the guardian's views and to inform the guardian of the ward's right to a hearing, to legal counsel, and to an independent evaluation. The guardian ad litem may also request that an independent evaluation of the person be obtained if more information is needed to make a recommendation to the court. After gathering all the necessary information, the guardian ad litem must report to the court on whether the person continues to meet the protective placement standards, whether the present placement is in the least restrictive environment, whether the person or guardian requests a change in status or placement, whether counsel should be appointed, and whether a full due-process hearing should be held. *Watts*, 122 Wis. 2d at 84–85.

Also under *Watts*, upon review of the guardian ad litem's report, the court must decide whether to appoint counsel, whether to order additional information, and whether to hold a full due-process hearing or a summary hearing. A full hearing is required whenever the person, guardian, or guardian ad litem requests it, or if the guardian ad litem's report indicates that the person no longer meets the protective placement standards, that the placement is not in the least restrictive facility, or that the person objects to the present placement. *Id.* at 85.

The Wisconsin Supreme Court reaffirmed *Watts* in *County of Dunn v. Goldie H. (In re Guardianship & Protective Placement of Goldie H.)*, [2001 WI 102](#), [245 Wis. 2d 538](#), [629 N.W.2d 189](#). In *Goldie H.*, the court further held that, if a full due-process hearing is not held, the court must hold a summary hearing, which requires a hearing on the record and factual findings, based on the factors in former [Wis. Stat. § 55.06\(2\)](#) (1999–2000) (since renumbered as [Wis. Stat. § 55.08\(1\)](#), see 2005 Wis. Act 264), to support the need for continued protective placement. *Goldie H.*, [2001 WI 102](#), ¶ 28, [245 Wis. 2d 538](#). Such a hearing is not an evidentiary hearing; it may take place in court or by other means (telephone or videoconference). The person who is the subject of the proceeding need not attend. The reasons for the summary hearing are to ensure that the person's procedural rights have been honored, to promote accountability by the guardian ad litem and the guardian, and to ensure that the person continues to meet the standards for protective placement. Thus, the guardian ad litem must be prepared for this hearing and be able to justify the material contained in the guardian ad litem's report to the court.

B. Statutory Requirements for Annual Reviews of Protective Placement Orders [§ 7.39]

1. In General [§ 7.40]

As part of the recodification of [Wis. Stat.](#) ch. 55 in 2006, the legislature created [Wis. Stat. § 55.18](#), which details the requirements for the annual reviews of protective placements as required by *State ex rel. Watts v. Combined Community Services Board*, [122 Wis. 2d 65](#), [362 N.W.2d 104](#) (1985), and *County of Dunn v. Goldie H. (In re Guardianship & Protective Placement of Goldie H.)*, [2001 WI 102](#), [245 Wis. 2d 538](#), [629 N.W.2d 189](#). [Wis. Stat. § 55.18](#) covers the requirements for the county's annual review and report, the guardian ad litem's appointment and duties, the court review procedures, and possible dispositions as the result of the review.

2. County Responsibilities [§ 7.41]

The county department designated to oversee protective services must file with the court a report of its annual review of an individual under protective placement by the first day of the 11th month after an initial order for protective placement is made and annually thereafter. [Wis. Stat. § 55.18\(1\)\(a\)](#). Within the same time period, the department must also file a petition with the court for the annual court review of the individual's protective placement. [Wis. Stat. § 55.18\(1\)\(a\)2](#). There is an exception to the timing of subsequent reviews if, after an annual review, a hearing is held for a modification or termination of a protective placement. In these cases, the county department must initiate proceedings for the next review by the first day of the 11th month following the date the court issues a final order after the hearing. [Wis. Stat. § 55.18\(1\)\(b\)](#).

The county's annual review must include a visit to the person under protective placement and a written evaluation of the person's physical, mental, and social condition and the person's service needs. [Wis. Stat. § 55.18\(1\)\(a\)](#). The review cannot be conducted by an employee of the facility where the person resides. [Wis. Stat. § 55.18\(1\)\(c\)](#). The guardian must be notified of the review, and the individual and the guardian must have an opportunity to submit comments regarding the person's need for protective placement or protective services. [Wis. Stat. § 55.18\(1\)\(a\)](#).

The report filed with the court must address the following: the functional abilities and disabilities of the person at the time of the review, including the person's need for health, social, and rehabilitation services and the level of supervision needed; the ability of community services to provide adequate support for the individual's needs; the person's ability to live in a less restrictive environment; the availability of community services and an estimate of the cost of community services to meet the person's needs; whether the protective placement should be terminated or whether the person should be placed in a different facility that is less restrictive, is closer to the person's home community, or more adequately meets the person's needs; the comments of the individual and the guardian during the performance of the review and the county's response; and any comments of staff persons of the facility where the person resides that are relevant to the review. [Wis. Stat. § 55.18\(1\)\(a\)1](#). A copy of this report must be given to the individual, the guardian, and the agent under an activated power of attorney for health care, if any. [Wis. Stat. § 55.18\(1\)\(a\)3](#).

If the person is an individual with developmental disabilities and is protectively placed in an intermediate facility or a nursing home, the county protective services agency must notify the county department "participating in the program under [[Wis. Stat. § 46.278](#)]" at least 120 days before the review. This department must develop a plan for noninstitutional community placement for the individual. The plan must be given to the court and to the individual's guardian. [Wis. Stat. § 55.18\(1\)\(ar\)](#).

Note. As of July 1, 2018, CIP, the program to which [Wis. Stat. § 46.278](#) purportedly applies, no longer exists. It has been replaced in every county in the state by the Family Care and IRIS programs, neither of which is administered by counties. *See supra* §§ [7.1](#), [7.27](#). It is unclear which, if any entity is required to provide the information required by [Wis. Stat. § 55.18\(1\)\(ar\)](#). As a practical matter, these cases seldom arise because there are so few remaining institutional facilities for people with developmental disabilities.

To ensure compliance with these requirements, each county must establish a written policy that specifies the procedures to be followed in conducting the annual reviews. [Wis. Stat. § 55.18\(4\)](#). In addition, the register in probate must file with the chief judge of the judicial administrative district a statement indicating whether the annual reports and petitions for review have been filed in a timely manner. If a report or petition has not been filed, the statement must provide reasons. This statement must be filed annually by January 31. [Wis. Stat. § 55.18\(5\)](#).

3. Guardian ad Litem Appointment and Duties [§ 7.42]

After the county has filed its annual report, the court must appoint a guardian ad litem. [Wis. Stat. § 55.18\(2\)](#). The guardian ad litem must review the county's annual report, the guardian's annual report, and any other relevant reports on the individual's condition. The guardian ad litem must meet with the individual and explain orally and in writing the procedure for the court review; the right to legal counsel, to an independent evaluation, and to a hearing that meets the procedural requirements of [Wis. Stat. § 55.10\(2\)–\(4\)](#); the content of the county's annual report; and the possibility that the court might order a change in or termination of the protective placement. The guardian ad litem must ascertain whether the individual wishes to exercise any of the individual's rights. The guardian ad litem must also contact the guardian and explain the above information orally and in writing. In addition, the guardian ad litem must review the individual's placement, condition, and rights with the guardian. [Wis. Stat. § 55.18\(2\)\(a\)–\(e\)](#).

Within 30 days after appointment, the guardian ad litem must file a written report with the court. This report must address whether the individual appears to continue to meet the standards for protective placement; whether the placement is in the least restrictive environment consistent with the individual's needs; whether the individual, guardian, or guardian ad litem requests an independent evaluation; whether the individual or guardian requests a modification or termination of the protective placement; whether the individual or guardian requests or the guardian ad litem recommends the appointment of legal counsel; and whether the individual, guardian, or guardian ad litem requests a hearing that meets the procedural requirements of [Wis. Stat. § 55.10\(2\)–\(4\)](#). [Wis. Stat. § 55.18\(2\)\(f\)](#); see Form [GN-4110](#) (Report and Recommendation of Guardian ad Litem (Annual Review of Protective Placement)). The guardian ad litem must also certify to the court that the guardian ad litem has complied with all the statutory duties. [Wis. Stat. § 55.18\(2\)\(g\)](#).

4. Court Review [§ 7.43]

The court must review the guardian ad litem's annual report, the county's annual report, and the guardian's annual report. The court must order an independent evaluation of the person's physical, mental, and social condition and service needs if the county report is not timely filed or does not meet the statutory requirements, if after review of the guardian ad litem's report the court determines it is necessary, or if the individual, guardian, or guardian ad litem requests it. [Wis. Stat. § 55.18\(3\)\(b\)](#). If the court orders an independent evaluation, the individual must pay for it unless the individual is indigent; in this case the county pays. [Wis. Stat. § 55.18\(3\)\(bm\)](#). The court may also order the county department to obtain any other necessary information about the individual. [Wis. Stat. § 55.18\(3\)\(br\)](#).

The court must refer an individual for appointment of legal counsel under [Wis. Stat. § 55.105](#) if, after review of the guardian ad litem's report, the court determines it necessary or if the individual, guardian, or guardian ad litem requests it. [Wis. Stat. § 55.18\(3\)\(c\)](#).

The court must also order a summary hearing or a hearing that meets the procedural requirements of [Wis. Stat. § 55.10\(2\)–\(4\)](#). A hearing under [Wis. Stat. § 55.10\(2\)–\(4\)](#) is required if the individual, guardian, or guardian ad litem requests it; the guardian ad litem's report indicates that the person no longer meets the standards for protective placement; the current placement is not the least restrictive environment consistent with the individual's needs; or the individual objects to the current placement. [Wis. Stat. § 55.18\(3\)\(d\)](#).

A summary hearing must be held on the record; may be held in court or by other means, including telephone or videoconference; is not an evidentiary hearing; and need not be attended by the individual. *Id.* The guardian ad litem must attend unless the court excuses personal appearance. [Wis. Stat. § 55.10\(4\)\(b\)](#). A full due-process hearing must meet all the requirements set forth in [Wis. Stat. § 55.10\(4\)](#). See *supra* [§ 7.15](#) (describing court hearing procedures).

5. Dispositional Options [§ 7.44]

After the hearing, the court must make one of the following dispositions: continue the protective placement, transfer the individual to a different placement, or terminate the placement.

If the court finds that the individual continues to meet the standards for protective placement and the placement is in the least restrictive environment, the court must continue the current placement. The court must include in the order the information on which the court relied. [Wis. Stat. § 55.18\(3\)\(e\)1](#).

If the court finds that the person continues to meet the standards for protective placement, but that the current placement is not the least restrictive environment consistent with the person's needs, the court must transfer the person to a more appropriate placement. In doing so, the court must also consider the county resources as set forth in [Wis. Stat. § 55.12\(3\), \(4\), \(5\)](#). Instead of ordering transfer to a specific placement, the court may order the county to develop or recommend a less restrictive placement, consistent with county resources, and arrange the individual's transfer within 60 days after the court's order. The court may extend this time period to permit development of a placement. The court may also order protective services in addition to the protective placement. As with an order for a continued placement, the court must include in its order the information on which it based its decision. [Wis. Stat. § 55.18\(3\)\(e\)2](#).

If the individual has a developmental disability and resides in an intermediate facility or nursing facility, the court must consider the county's plan for noninstitutional community placement and must order transfer to this setting unless the court finds that the current placement is the most integrated setting that is appropriate to the needs of the individual. [Wis. Stat. § 55.18\(1\)\(ar\)](#). *Most*

integrated setting is defined as “a setting that enables an individual to interact with persons without developmental disabilities to the fullest extent possible.” [Wis. Stat.](#) § 46.279(1)(bm). Note that this is a different standard than the usual standard of least restrictive environment consistent with the county’s placement resources. *See, e.g.,* [Wis. Stat.](#) § 55.12(3) (stating that county must provide protective placement or protective services “in the least restrictive environment and in the least restrictive manner consistent with the needs of the individual to be protected and with the resources of the county department”).

In the last dispositional option scenario, if the court finds that the person no longer meets the standards for protective placement, the court must terminate the protective placement order. [Wis. Stat.](#) § 55.18(3)(e)3. If the order is terminated, the court may determine that the person is appropriate for court-ordered protective services and order these services. [Wis. Stat.](#) § 55.17(3)(c)1. If placement is terminated, the person may stay in the current facility for up to 60 days to arrange the person’s new residential living arrangement. The county department must assist the individual to find alternative housing and necessary services. If the current placement is in a facility with fewer than 16 beds, the person can stay in the facility if the requirements for guardian consent under [Wis. Stat.](#) § 55.055 are met. [Wis. Stat.](#) § 55.17(3)(c)2., 3.

The court must provide a copy of its order to the individual, the guardian, the guardian ad litem, counsel, the health-care agent under an activated power of attorney for health care, the facility where the person resides, and the county department. [Wis. Stat.](#) § 55.18(3)(f).

C. Statutory Requirements for Annual Reviews of Court Orders for Involuntary Administration of Psychotropic Medication [§ 7.45]

The statutes require an annual review of court orders for the involuntary administration of psychotropic medication, *see* [Wis. Stat.](#) § 55.19, that is very similar to the annual review required for protective placement orders. Thus, in this section, only the areas of difference will be discussed; see section [7.43](#), *supra*, for a more complete description of the procedural requirements. If the individual has both a court order for involuntary administration of psychotropic medication and a protective placement order, the reviews should be conducted at the same time. [Wis. Stat.](#) § 55.19(1)(bm).

The county department designated to oversee protective services must conduct an annual review following the same time frame and procedures as for protective placement reviews. In a case involving involuntary administration of psychotropic medication, however, the focus of the review and the report to the court is on the following considerations: whether the individual continues to meet the standard for court-ordered protective services; whether the individual is not competent to refuse psychotropic medication; whether the individual continues to refuse to take the medication voluntarily; whether voluntary administration is not feasible or not in the individual’s best interests; whether the individual’s condition has been improved by the medication and whether the individual has responded positively to the medication; and whether the individual continues to meet one of the dangerousness criteria in [Wis. Stat.](#) § 51.20(1)(a)2. a.–e., if this standard was the basis for the original court order. [Wis. Stat.](#) § 55.19(1)(a)1. The county department must file a petition with the court for the review and file its report. [Wis. Stat.](#) § 55.19(1)(a)1., 2.

After the county department’s report is filed, the court must appoint a guardian ad litem. The guardian ad litem must meet with the individual and contact the guardian and convey the same information as required in a protective placement review. [Wis. Stat.](#) § 55.19(2)(a)–(d). The guardian ad litem must ascertain whether the individual wishes to exercise any of the individual’s rights. [Wis. Stat.](#) § 55.19(2)(e). Within 30 days after appointment, the guardian ad litem must also file a report to the court regarding whether the individual appears to continue to meet the standards for the involuntary administration of psychotropic medication under [Wis. Stat.](#) § 55.14; whether the individual or guardian requests termination of the order; whether the individual, the individual’s guardian, or the guardian ad litem requests an independent evaluation or a hearing that meets the procedural requirements of [Wis. Stat.](#) § 55.10(2); and whether the individual or guardian requests, or the guardian ad litem recommends, appointment of counsel. [Wis. Stat.](#) § 55.19(2)(f). The guardian ad litem must also certify to the court that the guardian ad litem has fulfilled the statutory requirements. [Wis. Stat.](#) § 55.19(2)(g).

Note. There is a separate form for the guardian ad litem report in psychotropic medication review cases: Form [GN-4260](#). The notice of rights provided to the individual and the guardian must be specific to this situation. [Wis. Stat.](#) § 55.19(2)(b), (c).

The court must review the reports of the county department and guardian ad litem and determine whether to order an independent evaluation, appointment of counsel, or a hearing that meets the procedural requirements of [Wis. Stat.](#) § 55.10, using the same criteria set forth for protective placement reviews. [Wis. Stat.](#) § 55.19(3)(a)–(d). After a summary hearing or a hearing that meets the

procedural requirements of [Wis. Stat. § 55.10](#), the court must do one of the following: continue the order, if it finds that the person still meets the standards for an order under [Wis. Stat. § 55.14\(8\)](#); modify the order or the treatment plan (with the guardian's approval), if the person continues to meet the standards but modification of the order or treatment plan would be in the person's best interests; or terminate the order, if the person no longer meets the standards for involuntary administration of psychotropic medication. [Wis. Stat. § 55.19\(3\)\(e\)](#). If the court terminates the order, the court must review the needs of the person for protective services and may order services if the person meets the standards for court-ordered protective services. [Wis. Stat. § 55.19\(3\)\(e\)3](#). The court must provide copies of its order to the individual, the guardian, the guardian ad litem, legal counsel, the county department, and any facility where the person was residing at the time the petition for annual review was filed. [Wis. Stat. § 55.19\(3\)\(f\)](#).

D. Role of the Guardian ad Litem [§ 7.46]

The court's holding in *State ex rel. Watts v. Combined Community Services Board*, [122 Wis. 2d 65](#), [362 N.W.2d 104](#) (1985), and the statutory requirements place the major burden of the annual review process on the court-appointed guardian ad litem. The guardian ad litem has a twofold role: (1) protect the person's legal rights by ensuring that the person receives proper notice of the nature of the proceedings and the person's rights and by communicating to the court any request by the person or the person's guardian for an independent evaluation, legal counsel, a hearing that meets the procedural requirements of [Wis. Stat. § 55.10](#), or termination or modification of an order; and (2) make recommendations to the court about the person's need for independent evaluations, for continued protective placement, for a change in placement to a less restrictive facility, or for any changes in court-ordered involuntary psychotropic medication.

The first responsibility of the guardian ad litem, protecting legal rights, is one that is natural for a lawyer. Nevertheless, because communicating with protectively placed persons might present challenges, special efforts and considerable time must be made to translate legal rights into simple, easily understood language. For information about interviewing and communicating with a person with mental disabilities, see [chapter 5](#), *supra*.

The second responsibility of the guardian ad litem, making a report to the court about the person's needs, requires skills and knowledge that most lawyers do not have without special training. The statute for an annual protective placement review requires that the guardian ad litem's report state the following to the court: (1) whether the person continues to meet the standards for protective placement; (2) whether the current placement is in the least restrictive environment consistent with the person's needs; (3) whether the person or guardian requests a change in status or placement; (4) whether an independent evaluation should be ordered; (5) whether counsel should be appointed; and (6) whether a hearing should be held that meets the procedural requirements of [Wis. Stat. § 55.10](#). [Wis. Stat. § 55.18\(2\)\(f\)](#); *see also* Form [GN-4110](#).

Traditional law school educations do not generally include courses that enable lawyers to make even threshold determinations of, for example, whether the person has "a primary need for residential care and custody," *see* [Wis. Stat. § 55.08\(1\)\(a\)](#), so as to continue to meet the standards for protective placement. Similarly, most lawyers lack the clinical skills needed to determine whether the person's current placement is in the least restrictive environment consistent with the person's needs. Such determination can be based, in part, on an assessment of the completeness of the protective services agency's annual report, as well as on an independent evaluation that the guardian ad litem might request. To make an informed report to the court, however, the guardian ad litem also needs to have basic knowledge of the nature and treatment of mental disability and of how to understand an institution's psychological reports and records. For information on the nature and treatment of mental disability, see [chapter 5](#), *supra*. In addition, the guardian ad litem should have a basic knowledge of the community resources available to persons having long-term mental disabilities. This knowledge can be obtained by contacting the county department, advocacy organizations for persons with various disabilities, community services providers, or the DHS. For more information on available services, see [chapter 5](#), *supra*.

More specifically, in conducting an annual protective placement review, guardians ad litem should interview persons who are subject to protective placements after informing them of their rights. Guardians ad litem should try to ascertain whether persons understand where they are, whether they understand that there is a court order, whether they have any objection to its continuation, whether they like the placement facility, and whether they would rather live somewhere else. The guardian ad litem must contact the person's guardian and explain the proceedings and the rights involved and discuss the person's current placement and needs. [Wis. Stat. § 55.18\(2\)\(b\)](#), (c), (d). The guardian ad litem should also talk with staff members at the facility about whether placement to another type of program has been considered or recommended and what the person's capabilities are. The guardian ad litem should also review the treatment records, the protective services agency's annual report, and the court file. As with an initial placement hearing, the guardian ad litem should not hesitate to use any available discovery tools if needed information is not voluntarily provided. Finally, the guardian ad litem should attempt to talk with the person's family members and friends to learn whether they

believe the person should be in a different placement. *See supra* [ch. 5](#) (information on interviewing persons with mental disabilities, identifying significant people in their lives, and checking files and records).

Note. The Seventh Circuit Court of Appeals has held that the integration mandate of the Americans with Disabilities Act (ADA) and the Rehabilitation Act applies to “a person ‘who can handle and benefit from’ time out in the general community.” *Steimel v. Wernert*, [823 F.3d 902](#), 910 (7th Cir. 2016). It further held that “isolation in a home may often be worse than confinement to an institution on every other measure of ‘life activities’ that *Olmstead* recognized.” *Id.* at 911; *see Olmstead v. L.C.*, [527 U.S. 581](#) (1999). In so holding, the Seventh Circuit rejected the state of Indiana’s argument that the mandate is only violated if people have “literally” become institutionalized. *Steimel*, 823 F.3d at 911–12, 916, 917. The case is important to the guardian ad litem’s practice when determining whether the person subject to protective placement is in the least restrictive environment and whether the person’s right to be free from discrimination is being violated under federal law. Making the least restrictive determination involves more than simply looking at the licensure, certification, or size of the person’s residential or institutional placement. The mere fact that a person resides in a two-bed adult family home or is living at home with a family member might not mean that the person is automatically living in the least restrictive environment. The guardian ad litem should be examining the person’s actual access to the larger community in determining whether the residence is the least restrictive and whether the person is being subjected to rights violations under federal law. The *Steimel* court noted one of the measures of possible restrictiveness was the total number of hours per week a person went out into the community. Evidence of socialization with people other than those with whom the person lives might be another. Yet another might be whether the person is working and, if so, whether it is in sheltered employment that is connected to the residential provider, rather than community employment.

If there seems to be consensus by all parties that the person is in the most appropriate facility and that the protective placement should continue, and if this squares with the guardian ad litem’s own perception, then the guardian ad litem is ready to write the report to the court. However, if there are conflicting viewpoints or if the guardian ad litem has questions, then the guardian ad litem should seek additional information from family and friends; a citizen advocate, if any; and other service providers. The guardian ad litem may also wish to ask the court to order an independent evaluation to assist the guardian ad litem in making recommendations. For information on assessing evaluations and obtaining needed evaluations, see [chapter 5](#), *supra*. Because the guardian ad litem has a 30-day deadline for filing the report, [Wis. Stat.](#) § 55.18(2)(f), it may be necessary to ask the court for an extension of time so that the examination can be completed.

As in initial protective placement proceedings, it is critical in the annual protective placement review that the guardian ad litem be able to negotiate with the county attorney, defense counsel, and the county department. If a hearing occurs under the procedures of [Wis. Stat.](#) § 55.10, the guardian ad litem has the same duties that the guardian ad litem would have in an initial placement hearing. If the court orders a change in placement or services, the guardian ad litem should endeavor to incorporate a specific time frame into the order. The guardian ad litem may also have some obligation to follow up on court-ordered changes in placement to see that they actually occur. The guardian ad litem may want to request clarification from the court as to when the guardian ad litem’s duties actually end. *See supra* § [7.32](#) (determining extent and termination of appointment).

A guardian ad litem should realize that funding considerations often dictate where a person lives. This is particularly true of persons who live in nursing homes funded by Medicaid. *See generally* 42 [U.S.C.](#) §§ 1396–1396w-8 (Title XIX of the Social Security Act); [Wis. Stat.](#) §§ 49.43–499. Such placement is free to the county. However, if the person is to move into the community, the county may have to pay with money it receives from the federal and state governments and with its own county funds. *See supra* [ch. 5](#) (further discussion of funding and sources); *see also supra* § [7.27](#) (evaluating potential placement resources and plans). Given the standards in protective services law, *see Wis. Stat.* § 55.12(4), which attempt to balance county resources against the person’s right to live in the least restrictive environment, the guardian ad litem will have to become knowledgeable about funding sources. The guardian ad litem may have to use experts to identify state or federal resources that the county is not presently using. In addition, the guardian ad litem may wish to conduct discovery to ascertain whether there are state or federal resources available that the county has not requested or utilized.

Note. The advent of long-term managed care in Wisconsin, in the form of Family Care and related programs, has created different funding-related issues. Through Family Care, the DHS shifted the responsibility for providing virtually all long-term care services from counties to private entities, the MCOs that contract with the state to provide long-term care services. MCOs often dictate provider rates that are considerably lower than those formerly paid by counties (and by the MCOs themselves in prior years). In a growing number of cases, providers claim that the rate is inadequate to support individuals who have been receiving residential services through Family Care. These providers then send notices of discharge to the residents, many of whom have lived stable lives in their facilities for many years.

A class of people threatened with discharge unsuccessfully sued the DHS and three of the state's contracting MCOs in federal court, alleging that the rate disputes had the effect of violating their rights under the ADA, the Rehabilitation Act, the Medicaid Act, and the U.S. Constitution. See *Amundson v. Wisconsin Dep't of Health Servs.*, [721 F.3d 871](#) (7th Cir. 2013). Guardians ad litem may find themselves involved in related cases under [Wis. Stat.](#) ch. 55 because, in some of these cases, the individual being threatened with discharge may have been protectively placed in the facility or may be in danger of being moved to a more restrictive facility if the discharge happens. The *Amundson* decision notwithstanding, guardians ad litem should be aware that the DHS's Family Care regulations permit administrative appeals of discharges that are caused by unreasonably low rates being offered to providers. See [Wis. Admin. Code](#) § DHS 10.55(1g)(e) (allowing enrollee to contest "[d]enial, in whole or in part, of payment for a service"). A selection of fair hearing decisions is searchable at *Elder Law in Wisconsin*, <http://www.elderlawwis.com> (last visited Oct. 8, 2024).

In annual protective placement reviews of persons with developmental disabilities who are residing in an intermediate facility (other than a state center for the developmentally disabled) or a nursing home, guardians ad litem should be aware of certain specific requirements. In particular, the county department "participating in the program under [[Wis. Stat.](#) §] 46.278" must develop a plan for noninstitutional community placement for a person with developmental disabilities, and the court must transfer the person into the community unless the court finds that the intermediate facility or the nursing home is the most integrated setting to meet the person's needs. [Wis. Stat.](#) § 55.18(1)(ar).

Note. As of July 1, 2018, CIP, the program to which [Wis. Stat.](#) § 46.278 purportedly applies, no longer exists. It has been replaced in every county in the state by the Family Care and IRIS programs, neither of which is administered by counties. See *supra* §§ [7.1](#), [7.27](#). It is unclear which, if any entity is required to provide the information required by [Wis. Stat.](#) § 55.18(1)(ar). As a practical matter, these cases seldom arise because there are so few remaining institutional facilities for people with developmental disabilities.

The guardian ad litem should also closely evaluate a county's request to terminate a protective placement. In some instances, this request may be motivated by the county's desire to end the annual court reviews and thereby remove the possibility of a court order for more appropriate services. Also, in some instances, termination of a protective placement order for someone in a community setting may jeopardize continued funding for that individual's services.

Finally, when conducting an annual review of a person ordered by the court to receive involuntary administration of psychotropic medication, the guardian ad litem must assess whether the person continues to meet the standard under [Wis. Stat.](#) § 55.14. This is a multifaceted standard that requires an assessment of competency to consent to the medication, current dangerousness, willingness or ability to take the medication voluntarily, and benefits of the medication. See *supra* §§ [7.28](#) (assessing need for psychotropic medications), [7.45](#) (statutory requirements for annual reviews of court orders for involuntary administration of psychotropic medication). In addition, in these proceedings, the court has the authority to order a modification of the order or the individual's treatment plan. See [Wis. Stat.](#) § 54.19(3)(e)2. Since many of these issues are difficult for someone who is not a mental-health professional to assess, it may be very important to request an independent evaluation if there are any questions raised about whether the person continues to meet the standards or if the court-ordered treatment seems to be appropriate.

VIII.

Other [Wis. Stat. Ch. 55 Proceedings](#) [§ 7.47]

A. Court Review of Transfers [§ 7.48]

A person under protective placement may be transferred between protective placement facilities or units or from a protective placement unit to a medical facility. Transfers cannot be made to facilities for psychiatric treatment. [Wis. Stat.](#) § 55.15(1). The guardian, a county department (or contract agency) overseeing the protective placement, the DHS, or a protective placement facility may make the transfer without first obtaining court approval. [Wis. Stat.](#) § 55.15(2).

In a nonemergency situation, the court and all other entities authorized to make transfers must receive 10 days' prior written notice. The notice must include notice of the right of the individual, the attorney, or another interested party to petition the court to review the transfer. [Wis. Stat.](#) § 55.15(5)(a). The guardian must provide written consent to the transfer; the county department must also provide written consent if the transfer is to a facility that is more costly to the county. [Wis. Stat.](#) § 55.15(3), (4).

In emergency situations, transfer may be made without notice under [Wis. Stat. § 55.15\(5\)\(a\)](#) and without the consent of the guardian or county. [Wis. Stat. § 55.15\(4\), \(5\)\(b\)](#). The party making an emergency transfer must provide notice immediately upon transfer to the other entities authorized to make transfers and must provide notice to the court within 48 hours after the transfer. The notice must include notice of the right to object to the emergency transfer by petition to the court. [Wis. Stat. § 55.15\(5\)\(b\)](#).

An individual under protective placement, the guardian, the attorney, or other interested persons may petition the court for a review of the transfer. [Wis. Stat. § 55.15\(6\)](#); *see also Linda L. v. Collis (In re Guardianship & Protective Placement of Catherine P.)*, [2006 WI App 105](#), ¶ 66, [294 Wis. 2d 637](#), [718 N.W.2d 205](#) (finding that guardian ad litem was an “interested person” under [Wis. Stat. § 55.01\(4\)](#) and could request a review of a transfer of person who was protectively placed under [Wis. Stat. § 55.06\(9\)\(b\)](#) (2003–04), predecessor statute to [Wis. Stat. § 55.15\(6\)](#)). The court must order a hearing within 10 days after the filing of the petition. [Wis. Stat. § 55.15\(7\)\(a\)](#). A guardian ad litem must be appointed to represent the individual at the hearing. [Wis. Stat. § 55.15\(7\)\(c\)](#). Legal counsel must also be appointed if so requested. [Wis. Stat. § 55.15\(7\)\(cm\)](#); *see also Wis. Stat. § 55.105*. The individual, petitioner, guardian ad litem, attorney, and guardian have the right to be present at the hearing and to present and cross-examine witnesses. [Wis. Stat. § 55.15\(7\)\(d\)](#). In determining whether to approve a transfer, the court must consider whether the transfer is to a facility that is permitted under [Wis. Stat. § 55.12\(2\)](#) and (6), whether the facility is the least restrictive environment consistent with county resources (or, if it is to a nursing home or an intermediate facility, whether it is the most integrated setting), and whether the proposed placement is in the person’s best interests. [Wis. Stat. § 55.15\(8\)](#).

After the hearing on the transfer, the court may take one of three actions: prohibit the transfer if the court finds that the proposed placement does not meet the above standards; approve the transfer if it finds it does meet the above standards; or terminate the protective placement if it finds the person no longer meets the standards for protective placement. If the court approves the transfer, the court may also order any protective services that the person needs. [Wis. Stat. § 55.15\(9\)](#).

B. Modification of a Court Order for Protective Placement or Services [§ 7.49]

At any time, the individual, the guardian, legal counsel, the guardian ad litem, the DHS, the county department that placed the person or provided court-ordered protective services, an agency under contract with the county department, or any interested person may petition the court for a modification of the protective placement or protective services order. [Wis. Stat. § 55.16\(2\)](#). Thus, court reviews of protective placements that are in addition to the annual review are possible. Court-ordered protective services, other than involuntary administration of psychotropic medication, are not subject to an automatic annual review. Thus, this mechanism may be the only means for a review of a protective services order that does not involve a protective placement or psychotropic medication.

The court must hold a hearing within 21 days after the filing of the petition unless a hearing on court-ordered protective services or protective placement or transfer of a protective placement has been held within the past six months. [Wis. Stat. § 55.16\(3\)\(a\)](#). The court may extend the 21-day limitation if the individual, guardian, guardian ad litem, or legal counsel requests an extension. [Wis. Stat. § 55.16\(3\)\(b\)](#). Hearings under this section are subject to the requirements of [Wis. Stat. § 55.10](#). [Wis. Stat. § 55.16\(3\)\(c\)](#); *see supra* [§ 7.15](#) (describing court hearing procedures).

A guardian ad litem must be appointed in all cases. The duties of the guardian ad litem for modification of protective placement appear to be the same as in initial protective placement cases. [Wis. Stat. § 55.16\(3\)\(c\)](#) states that the hearings are subject to [Wis. Stat. § 55.10](#). [Wis. Stat. § 55.10\(4\)\(b\)](#) requires the appointment of a guardian ad litem and cross-references [Wis. Stat. § 54.40](#) for the duties of the guardian ad litem. *See Wis. Stat. § 54.40(4)*. There is no further statutory discussion of the duties of the guardian ad litem in hearings to modify protective placements.

The duties of the guardian ad litem in cases involving a modification of a protective services order appear to be spelled out in [Wis. Stat. § 55.195](#), which applies to any review of a protective services order other than those for involuntary administration of psychotropic medication. Under this section, the guardian ad litem must interview the individual and explain orally and in writing the review procedure and the rights to an independent evaluation, legal counsel, and a hearing; review all relevant reports; review the person’s condition, services, and rights with the guardian; request that the court order additional evaluations, if necessary; report to the court if the individual requests appointment of counsel or a hearing; report to the court whether the individual objects to the continued finding of incompetency, the current or proposed services, the position of the guardian, or the recommendation of the guardian ad litem as to the best interests of the individual, or whether there is ambiguity of the individual on any of these matters; and provide a summary written report to the court. The guardian ad litem must attend the hearing. [Wis. Stat. § 55.195\(1\)–\(9\)](#).

After the hearing, the court may make the following orders in regard to modification of a protective placement. If the court finds that the person continues to meet the standards for protective placement and the placement is in the least restrictive environment consistent with the individual's needs and the county's resources, it must continue the placement. [Wis. Stat. § 55.16\(4\)\(a\)](#). If the court finds that the person continues to meet the standards for protective placement, but that the placement is not in the least restrictive environment, it must order transfer of the placement to a less restrictive environment consistent with the individual's needs and the county's resources. Instead of ordering transfer to a specific facility, the court may order the county department to develop a placement and arrange for the person's transfer within 60 days after the court's order. The period within which the transfer must take place may be extended if need be. [Wis. Stat. § 55.16\(4\)\(b\)](#). If the court finds that the person no longer meets the standards for protective placement, it must terminate the placement and follow the requirements under [Wis. Stat. § 55.17\(3\)\(c\)](#) for services after a protective placement is terminated. [Wis. Stat. § 55.16\(4\)\(c\)](#); *see infra* § [7.50](#).

After the hearing, the court may make the following orders in regard to a modification of an order for protective services other than the involuntary administration of psychotropic medication. If it finds that the person continues to meet the standards for court-ordered protective services and that the services are being provided in the least restrictive manner consistent with the individual's needs and the county's resources, it may continue the order. [Wis. Stat. § 55.16\(5\)\(a\)1](#). If it finds that the individual continues to meet the standards but the services are not being provided in the least restrictive manner, it must order services that are more consistent with the statutory requirements of [Wis. Stat. § 55.12\(3\)](#), (4), and (5). [Wis. Stat. § 55.16\(5\)\(a\)2](#). If the court finds that the person no longer meets the standards for court-ordered protective services, it must terminate the order and follow the requirements in [Wis. Stat. § 55.17\(4\)\(a\)3](#). [Wis. Stat. § 55.16\(5\)\(a\)3](#); *see infra* § [7.50](#). If the hearing involved the modification of an order for the involuntary administration of psychotropic medication, the court may make one of the dispositions outlined in [Wis. Stat. § 55.19\(3\)\(e\)](#), which governs the annual reviews of such orders. [Wis. Stat. § 55.16\(5\)\(b\)](#); *see supra* § [7.45](#).

C. Termination of Order for Protective Services or Protective Placement [§ 7.50]

At any time, the individual, the guardian, the guardian ad litem, the DHS, the county department or agency the DHS contracts with, or an interested person may petition the court for termination of a protective placement or protective services order. The petition must allege that the person no longer meets the standards for protective placement or court-ordered protective services. [Wis. Stat. § 55.17\(1\)](#). The hearing requirements are the same as those in a proceeding for modification of a protective placement or protective services order. [Wis. Stat. § 55.17\(2\)](#); *see supra* § [7.49](#). The guardian ad litem duties are also the same. *See* [Wis. Stat. §§ 55.16\(3\), 55.10\(4\)\(b\), 55.195](#).

After the hearing for an individual under protective placement, the court may make the following dispositions. If it finds that the person continues to meet the standards and that the placement is in the least restrictive environment, it must continue the placement. [Wis. Stat. § 55.17\(3\)\(a\)](#). If it finds that the person continues to meet the standards but the placement is not in the least restrictive environment, it must modify the placement order as permitted in [Wis. Stat. § 55.16\(4\)\(b\)](#). [Wis. Stat. § 55.17\(3\)\(b\)](#). If it finds that the person no longer meets the standards, it must terminate the order and review the person's need for protective services. If it finds that the person meets the standards for court-ordered protective services, other than involuntary administration of psychotropic medication, it may order the services. If the individual is being transferred or discharged from the individual's current residence, the county department must assist the person with discharge planning, including planning for a proper residential living arrangement and necessary support services. The person may stay in the person's current residence for up to 60 days while arrangements are being made. If the current residence has fewer than 16 beds, the person may remain there if the guardian gives the necessary consent and other requirements are followed. [Wis. Stat. § 55.17\(3\)\(c\)1.–3](#).

After the hearing for an individual receiving court-ordered protective services, other than involuntary administration of psychotropic medication, the court may make the following dispositions. If the individual continues to meet the standards for court-ordered services and the services are being provided in the least restrictive manner, the court must continue the order. [Wis. Stat. § 55.17\(4\)\(a\)1](#). If the individual meets the standards but the services are not being provided in the least restrictive manner, it may order modification of the services. [Wis. Stat. § 55.17\(4\)\(a\)2](#). If the person no longer meets the standards, the court must terminate the order. [Wis. Stat. § 55.17\(4\)\(a\)3](#). If the order is for involuntary administration of psychotropic medication, the court may make an order that is consistent with the orders permitted after an annual review of such court orders. [Wis. Stat. § 55.17\(4\)\(b\)](#); *see* [Wis. Stat. § 55.19\(3\)\(e\)](#); *see also supra* § [7.45](#).

IX. Forms [§ 7.51]

Parties and court officials in all civil actions and proceedings in circuit court must use any applicable standard court forms adopted by the Wisconsin Judicial Conference. *See, e.g., Wis. Stat.* § 807.001. Mandatory forms adopted by the Judicial Conference are available from all clerk of court's offices and are also listed on and downloadable from the Wisconsin Court System's website: <https://www.wicourts.gov/forms1/circuit/index.htm>. If the Judicial Conference does not create a standard court form for a particular action or pleading, then a format consistent with any statutory or court requirements may be used. *Wis. Stat.* § 807.001(4). A guardian ad litem in a protective placement proceeding should be particularly aware of the following mandatory court form: Form [GN-4110](#) (Report and Recommendation of Guardian ad Litem (Annual Review of Protective Placement)). A guardian ad litem in an annual review of an order authorizing involuntary administration of psychotropic medications should be particularly aware of the following mandatory court form: Form [GN-4260](#) (Psychotropic Medication Report and Recommendation of Guardian ad Litem (Annual Review)).

For information about whether a particular mandatory form exists or may have been superseded, contact the Records Management Committee (RMC), which advises the Director of State Courts Office and is responsible for developing the standard court forms.

Chapter 8

State Mental Health Act:

Wis. Stat. Ch. 51

[Kristin Kerschensteiner](#)

I. Scope [§ 8.1]

This chapter provides a brief overview of the law governing involuntary and voluntary mental health services and alcohol and drug-dependence services, and a discussion of the guardian ad litem's role. The chapter covers voluntary admissions of adults and minors to inpatient facilities, admissions of nonprotesting adults, and outpatient treatment of minors. The chapter also covers involuntary commitments and the relationship of commitment to protective placement. Wisconsin's Mental Health Act is located in *Wis. Stat.* ch. 51, which governs the following: (1) voluntary admissions and discharges for persons in inpatient facilities; (2) civil commitments; (3) the delivery of services for mental illness, developmental disability, alcoholism, and drug dependence; and (4) the rights of persons receiving these services.¹

Note. *Inpatient facility* is defined as “a public or private hospital or unit of a hospital which has as its primary purpose the diagnosis, treatment and rehabilitation of mental illness, developmental disability, alcoholism or drug abuse and which provides 24-hour care.” *Wis. Stat.* § 51.01(10). Additionally, crisis urgent care and observation facilities authorized by *Wis. Stat.* § 51.036 may accept involuntary patients brought to the facilities pursuant to *Wis. Stat.* § 51.15.

Wis. Stat. ch. 51 specifically provides for appointment of a guardian ad litem in only a few proceedings—nonprotesting voluntary admissions, voluntary admissions of minors, and involuntary commitments of minors for alcoholism treatment. Under *Wis. Stat.* § 803.01(3), however, it is possible for a guardian ad litem to be appointed in other proceedings. The supreme court removed from *SCR* ch. 36 any continuing legal education (CLE) requirements for appointment as a guardian ad litem for an adult in proceedings under *Wis. Stat.* ch. 51. *Wis. Sup. Ct. Order 03-03A*, 2012 WI 13, 339 Wis. 2d xli (eff. July 1, 2012). *SCR* ch. 36 is similar to the rule in *SCR* ch. 35, which does not require completion of a certain CLE curriculum to serve as a guardian ad litem for a minor in *Wis. Stat.* ch. 51 proceedings.

II. Voluntary Admission to Inpatient Units [8.2]

A. Voluntary Admission of Adults for Treatment of Mental Illness, Developmental Disability, or Drug Dependence [§ 8.3]

1. Overview of the Procedures [§ 8.4]

Admission to an inpatient facility is generally a straightforward hospital admission when no funding from the county department is involved. See [Wis. Stat. § 51.10\(4m\)](#). In such admissions, usually the only issue is whether the person has given voluntary consent.

Additional considerations under [Wis. Stat. ch. 51](#) come into play if the person is admitted to a public or private inpatient facility or a state center for persons with developmental disabilities through a county department or if department funding is involved. See [Wis. Stat. § 51.10\(1\), \(2\)](#). In those circumstances, the director of the facility (or the director of the center, under [Wis. Stat. § 51.10\(1\)](#)), or the director's designee, and the director of the appropriate county department under [Wis. Stat. § 51.42](#) or [Wis. Stat. § 51.437](#) must approve the admission. See [Wis. Stat. § 51.10\(1\), \(2\)](#).

The admission must be based on an evaluation that the person is mentally ill or developmentally disabled or is an alcoholic or drug dependent. An individual may also be admitted for the purpose of obtaining such an evaluation. The applicant must also have the potential to benefit from inpatient care, treatment, or therapy. [Wis. Stat. § 51.10\(4\)](#). The person need not meet a dangerousness standard, *id.*; see [Wis. Stat. § 51.20\(1\)\(a\)2.](#), and must sign a voluntary admission form, [Wis. Stat. § 51.10\(4m\)\(a\)2](#).

On admission to any inpatient facility, either publicly or privately funded, the person must be given a copy of the patients' rights provisions of [Wis. Stat. § 51.61](#) and be informed of how to obtain discharge. [Wis. Stat. § 51.10\(5\)\(a\), \(b\)](#). Discharges in cases of psychiatric admissions differ from other hospital discharges, in that psychiatric admissions allow for the detention of people against their will if certain conditions are met. According to [Wis. Stat. § 51.10\(5\)\(a\), \(b\), and \(c\)](#), when a person wants to be discharged from a voluntary admission to an inpatient facility, the person may submit a written request. At this time, the treatment director or designee may evaluate whether the person meets one of the dangerousness standards for commitment set out in [Wis. Stat. § 51.20\(1\)\(a\)2.](#) or (am). If the treatment director or designee determines that the person is not dangerous, then the person must be discharged. [Wis. Stat. § 51.10\(5\)\(c\)](#). If there is reason to believe that the person does meet one of the standards, then the treatment director or designee must file a statement of emergency detention with the court. *Id.*; see [Wis. Stat. § 51.15\(10\)](#). This dangerousness evaluation must be completed and the emergency detention statement filed by the end of the next workday after the request for discharge is made, or by the end of the next Monday if the request is made over the weekend. [Wis. Stat. § 51.10\(5\)\(c\)](#). The person must be notified immediately of the decision to file a statement of emergency detention. *Id.* After the statement is filed, the person may be held for up to 72 hours, exclusive of weekends and holidays, from the time the person has requested a discharge, pending the holding of a probable-cause hearing by the court. *Id.* Thereafter, the procedures are the same as for a civil commitment. See *infra* §§ [8.19–36](#) (civil commitment).

2. Voluntary Admission of an Incompetent Person [§ 8.5]

Because the ability to make a knowing decision is a key issue in a properly executed voluntary admission, problems arise when the hospital staff questions a person's competency. In such a case, the treatment director may temporarily admit the person and then must apply to the court within 48 hours, exclusive of weekends and holidays, for the appointment of a guardian. See [Wis. Stat. § 51.10\(7\)](#); see also *supra* [ch. 6](#) (guardianship proceedings). The person may stay at the hospital pending the appointment of the guardian. [Wis. Stat. § 51.10\(7\)](#).

If an adult who is the subject of a voluntary admission procedure already has a guardian of the person, the individual may be voluntarily admitted if both the guardian of the person and the individual give consent. [Wis. Stat. § 51.10\(8\)](#). This might not be possible, however, if the person is unable to understand what is happening and is unable to give consent. Alternatively, the guardian alone may consent to the admission if a physician of the facility submits a signed request and certifies in writing, before at least two witnesses, that the physician has advised the patient in the presence of the witnesses both orally and in writing of (1) the patient's right to leave upon submission of a written request (unless a statement of emergency detention is filed, [Wis. Stat. § 51.10\(5\)](#)), (2) the benefits and risks of treatment, (3) the patient's right to the least restrictive form of treatment appropriate to the patient's needs, and (4) the responsibility of the facility to provide the patient with this treatment. See [Wis. Stat. § 51.10\(4m\)\(a\)1.](#); see *infra* [§ 8.8](#) (describing nonprotesting voluntary admission procedures under [Wis. Stat. § 51.10\(4m\)\(a\)1.](#)). If the person meets the dangerousness requirements of [Wis. Stat. ch. 51](#), a civil commitment may be used. See *infra* §§ [8.19–36](#). Alternatively, it may be necessary to assess the situation to determine whether admission to an inpatient facility is needed. A protective placement to another type of facility may be more appropriate. See *supra* [ch. 7](#) (protective placement).

B. Voluntary Admission of Adults for Treatment of Alcoholism and Drug Dependence [§ 8.6]

Voluntary admission of adult alcoholics and adults who are drug dependent is done in accordance with [Wis. Stat. § 51.45\(10\)](#). [Wis. Stat. § 51.10\(3\)](#). The statutes deal with voluntary admissions of persons with alcoholism or drug dependence only when to approved public treatment facilities. [Wis. Stat. § 51.45\(10\)\(e\)](#). In such a situation, the person applies to the treatment facility and must obtain approval of the facility director and the county department of community programs. [Wis. Stat. §§ 51.10\(1\), \(3\), 51.45\(10\)\(a\), \(b\)](#). Unlike the case of a person who is mentally ill or developmentally disabled, an alcoholic or drug-dependent person who wishes to leave the facility cannot be detained on a director's order. Instead, the county department must assist in obtaining supportive services and a place to live if the person is an alcoholic, a person with a drug dependence, or an intoxicated person. [Wis. Stat. § 51.45\(10\)\(c\)](#).

Note. In the case of an alcoholic or drug-dependent person who has been adjudicated incompetent under Wisconsin's guardianship statutes, *see* [Wis. Stat. ch. 54](#), an application for voluntary admission to a treatment facility may still be made. If a Wisconsin court has deprived the proposed patient of the right to contract, the individual's guardian must make the application. If the individual has retained the right to contract, the application can be made by either the individual or the individual's guardian or other legal representative. [Wis. Stat. § 51.45\(10\)\(a\)](#). A request for discharge for a person who has been adjudicated incompetent must be made by the individual's guardian or other legal representative unless the person was the original applicant, in which case the person may request discharge directly. [Wis. Stat. § 51.45\(10\)\(c\)](#).

C. Nonprotesting Voluntary Admission [§ 8.7]

1. Overview of the Procedures [§ 8.8]

Under [Wis. Stat. § 51.10\(4m\)\(b\)](#), a person may be voluntarily admitted to an inpatient treatment facility, such as a psychiatric hospital or unit, for a limited time without the person signing the admission form. This type of admission is known as a nonprotesting voluntary admission. It may be used for persons with mental illness, developmental disabilities, drug dependence, or alcoholism who fail to indicate a desire to leave the facility but who refuse or are unable to sign an application for admission. *See* [Wis. Stat. § 51.10\(4m\)\(b\)](#). For this to happen, a physician of the facility must submit a signed request for the person's admission and certify before two witnesses that the physician advised the person in the presence of the witnesses both orally and in writing of the benefits and risks of treatment, the discharge procedure, the right to treatment in the least restrictive environment, and the hospital's responsibility to provide the person with treatment. [Wis. Stat. § 51.10\(4m\)\(a\)1](#). The person may then be admitted as a voluntary patient for up to seven days, provided that the person does not indicate a desire to leave. [Wis. Stat. § 51.10\(4m\)\(b\)](#). On the next court day after the admission, the facility must notify the probate court of the county where the facility is located of the admission. Within 24 hours, excluding weekends and holidays, the court must appoint a guardian ad litem. [Wis. Stat. § 51.10\(4m\)\(c\)](#).

If county funds are involved in paying for the admission, approval of the county department of community programs is required. [Wis. Stat. § 51.10\(4m\)\(a\)](#); *see also* [Wis. Stat. § 51.10\(1\), \(2\)](#).

2. Role of the Guardian ad Litem [§ 8.9]

In the case of an individual admitted to an inpatient facility based on a physician's signed request under [Wis. Stat. § 51.10\(4m\)\(a\)1](#)., the guardian ad litem's duties are to visit the facility and determine whether the requirements of the law have been followed and to visit the person within 48 hours after the appointment, excluding weekends and holidays. *See* [Wis. Stat. § 51.10\(4m\)\(c\)](#). To ascertain whether there has been compliance with this section, the guardian ad litem should ask to see the physician's statement under [Wis. Stat. § 51.10\(4m\)\(a\)1](#). and should discuss with the staff how the person was informed of the person's rights. The guardian ad litem must then inform the person of all the person's rights under [Wis. Stat. ch. 51](#) (the right to request discharge, the right to treatment in the least restrictive environment, the right as a voluntary patient to refuse medications, and so forth) and ascertain whether the person wishes to receive a less restrictive form of treatment. *Id.* If the person does wish to receive a less restrictive form of treatment, the guardian ad litem must assist the person in securing alternative treatment from the facility. *Id.* Alternative treatment could include discharge to more appropriate care in the community.

Thus, the guardian ad litem must be able to interview the person to find out what the person wants, and to negotiate on the person's behalf, if necessary, to try to secure more appropriate treatment. The lawyer may think that some assistance is needed for these tasks. Hospital staff, particularly social workers, and the person's family or friends may be able to provide additional information about whether the person seems satisfied in the facility. If alternative treatment is desired, people who have been treating

the person in the community, the staff of the county department of community programs, or hospital social workers may be able to assist. If the person has a serious and persistent mental illness but does not want to stay in the facility and is not committable, it is important to try to find a mental health professional in the community, perhaps in a crisis program or community support program, who will provide follow-up care and check on the person's condition after the person leaves the hospital.

Seven days after admission, if the person still has not signed a voluntary admission form, then the person, the guardian ad litem, and the doctor who signed the original request for admission must appear before the court to determine whether the person should remain as a voluntary patient. [Wis. Stat. § 51.10\(4m\)\(d\)](#). As long as the person does not indicate a desire to leave the facility, the person may remain as a voluntary patient. If the patient wishes to leave the facility, the facility must discharge the person. If the facility has reason to believe the patient is eligible for involuntary commitment, the facility may initiate this process. *Id.*

A hospital cannot discharge a person without some sort of follow-up. [Wis. Stat. § 51.35\(5\)](#) requires that the facility making the discharge ensure that the person has “a proper residential living arrangement and the necessary transitional services.” Under this section a proper residential living arrangement cannot include a “shelter facility,” as defined under [Wis. Stat. § 16.308\(1\)\(d\)](#), unless the discharge or transfer to the shelter facility is made on an emergency basis for 10 days or less. [Wis. Stat. § 51.35\(5\)](#). Also, if the person has a serious and persistent mental illness, the department or individual authorizing the discharge must, with the person's permission, refer the person to the county department responsible under [Wis. Stat. § 51.42](#) for an evaluation of the need for and feasibility of community services and assist the person in applying for any potentially applicable public assistance. [Wis. Stat. § 51.35\(4m\)](#). If the person is an alcoholic or drug dependent, the provisions of [Wis. Stat. § 51.45\(10\)\(c\)](#) apply. *See supra* § [8.6](#) (voluntary admission of adults for treatment of alcoholism and drug dependence).

If the guardian ad litem thinks that the person is incompetent, the guardian ad litem, although not required to do so, should report this to the treatment director of the facility. Under [Wis. Stat. § 51.10\(7\)](#), the treatment director then must apply to the court for the appointment of a guardian for the person. *See supra* [ch. 6](#) (incompetency and guardianship proceedings).

For further information on adults with disabilities, see generally [chapter 5](#), *supra*. For information on payment of the guardian ad litem, see [chapter 7](#), *supra*.

D. Voluntary Admission of Minors to Psychiatric Hospitals or Units, Treatment Facilities for Alcoholism or Drug Abuse, or Centers for the Developmentally Disabled [§ 8.10]

1. Introduction [§ 8.11]

Voluntary admission of minors is much more complex than admission of adults because young children cannot consent to treatment. Traditionally, parents have provided consent for them. The law also recognizes, however, that the interests of parents and the interests of their children might not always agree. This may be especially so as a child approaches the age of majority. Therefore, [Wis. Stat. ch. 51](#) provides certain procedures to safeguard the rights of the children involved and to monitor the appropriateness of inpatient admissions. These provisions apply to minors receiving treatment for mental illness, developmental disabilities, alcoholism, or drug abuse.

Admissions of children under the age of 14 for the purpose of treatment for mental illness or developmental disability are executed by a parent with legal custody or by a guardian. Any indication that the minor does not agree to the admission must be noted on the face of the application. [Wis. Stat. § 51.13\(1\)\(a\)](#). Applications for admissions of minors 14 years old or older are executed by both the minor and a parent with legal custody or a guardian. [Wis. Stat. § 51.13\(1\)\(b\)](#). But the parent or guardian may execute the application on the minor's behalf if the minor refuses to consent to the admission, in which case a petition for court review must be filed as discussed in section [8.12](#), *infra*. *See* [Wis. Stat. § 51.13\(4\)\(a\)](#).

If a minor is admitted to a facility for treatment of mental illness or developmental disability while under the age of 14 and is considered to be in need of continued inpatient treatment after reaching the age of 14, the director of the facility must request that both the minor and the minor's parent or guardian execute a new application for admission within the 30 days before the minor's 14th birthday. If the minor refuses, the minor's parent or guardian may execute the application on the minor's behalf. Once an application is executed, the procedures for court review discussed in section [8.12](#), *infra*, must be followed unless there has been a similar review within the previous 120 days. If the application is not executed by the time the minor reaches the age of 14, the minor must be discharged or a petition for emergency detention filed. [Wis. Stat. § 51.13\(7\)](#).

Regardless of the minor's age, the application for admission to an approved inpatient facility for the primary purpose of treatment for alcoholism or drug abuse is executed by a parent with legal custody or by a legal guardian. Any indication that the minor does not agree with the admission must be noted on the face of the application, [Wis. Stat.](#) § 51.13(1)(a), (bm); if the minor is 14 years old or older, a petition for court review must also be filed. [Wis. Stat.](#) § 51.13(1)(bm), (4)(a). There is an exception for an admission for detoxification for alcohol or drug abuse that lasts for no longer than 72 hours. In this situation, a minor who is 12 years old or older may consent to the admission without parental consent. [Wis. Stat.](#) § 51.47.

If a minor of any age wishes to be admitted to an inpatient treatment facility for mental health, developmental disability, or alcoholism or drug abuse treatment, and the minor's parent or guardian cannot be found, or there is no parent with legal custody and no guardian, or in the case of a minor 14 years old or older, the parent or guardian refuses to execute the application, the minor or a person acting on the minor's behalf may petition the court under [Wis. Stat.](#) § 51.13(4) for approval of the admission. [Wis. Stat.](#) § 51.13(1)(c).

Even if a petition for emergency detention or involuntary commitment has been filed against a minor, the court may permit the minor to be admitted under [Wis. Stat.](#) § 51.13. Once the application is executed and approved according to the statutory requirements, the involuntary detention or commitment proceedings are dismissed. [Wis. Stat.](#) § 51.13(1)(d).

2. Court Review Procedures [§ 8.12]

Generally, a custodial parent or a guardian can execute an application for admission of a minor under 14 years of age to an approved treatment facility for the primary purpose of treatment for mental illness, developmental disability, or alcoholism or drug abuse without court review. [Wis. Stat.](#) § 51.13(1)(a). Court review of the admission of a minor under the age of 14 is required only when the minor requests treatment and the parent or guardian cannot be found or there is no parent with legal custody or guardian. [Wis. Stat.](#) § 51.13(1)(c). Except for short-term admissions of 12 days or less agreed to by the minor, see [Wis. Stat.](#) § 51.13(6), and voluntary inpatient treatment for mental illness or developmental disability, see [Wis. Stat.](#) § 51.13(1)(b), the court must review every admission of minors 14 years old or older. [Wis. Stat.](#) § 51.13(4)(a). Depending on the circumstances described below, this may range from a simple review of the petition to a full evidentiary hearing.

Within three days after admission or application for admission, whichever occurs first, the treatment director of the facility or center for the developmentally disabled must file a verified petition with the juvenile court of the county where the facility is located. [Wis. Stat.](#) § 51.13(4)(a). The petition must contain (1) facts substantiating the need for services, (2) facts substantiating the appropriateness of the admission, (3) the basis for the opinion that inpatient treatment in the facility is the least restrictive treatment consistent with the needs of the minor, and (4) notation of any refusal of a minor 14 years old or older to join in the application. [Wis. Stat.](#) § 51.13(4)(a)3.–6. The court may, on its own motion or on the motion of any interested party, remove the petition to the county of residence of the parent or guardian if hardship would occur and it is in the best interests of the minor. [Wis. Stat.](#) § 51.13(4)(b). If the parent or guardian is not the petitioner, a copy of the petition and a notice of hearing must be served on the parent or guardian at that person's last-known address. [Wis. Stat.](#) § 51.13(4)(a). Copies of the application for admission, if any, and all professional evaluations must be attached to the petition. *Id.* Within five days after admission, the petitioner must provide a copy of the petition to the minor and the minor's parent or guardian. [Wis. Stat.](#) § 51.13(4)(c).

Within five days after the filing of the petition, the court must determine, on the basis of the treatment director's verified petition, that the following four factors are present: (1) there is a prima facie showing that the minor needs treatment; (2) the facility provides therapy appropriate to the minor's needs; (3) the treatment is the least restrictive consistent with the minor's needs; and (4) if the minor is 14 years old or older and has been admitted for treatment of a mental illness or developmental disability, the admission was made by both the minor and the minor's parent or guardian. [Wis. Stat.](#) § 51.13(4)(d). In the case of the admission of a minor of any age to an inpatient facility for treatment of alcoholism or drug abuse, the application for voluntary admission is executed by the parent alone, rendering the fourth finding unnecessary. See [Wis. Stat.](#) § 51.13(1)(a), (bm). The court must find all these factors are present to approve the admission on the basis of the petition and accompanying documents.

If the court is unable to make these determinations, it may dismiss the petition, see [Wis. Stat.](#) § 51.13(4)(h); order additional information, including an independent evaluation, to be produced as necessary for the court to make those determinations within seven working days after admission or application for admission, whichever is sooner; or hold a hearing within seven working days after admission or application for admission, whichever is sooner. [Wis. Stat.](#) § 51.13(4)(d). It is possible that the minor's parent may

wish to inform the court at this stage about issues regarding one or more applicable factors that might influence whether the court decides to approve the admission based on the petition, require more information, or hold a hearing.

A hearing and an independent evaluation are required if the minor is 14 years old or older and has been admitted for the purpose of treatment for mental illness or developmental disability, and (1) the application for admission was executed by the parent or guardian over the minor's objection; or (2) a hearing is requested by the minor or the minor's legal counsel, parent, or guardian. *Id.* The hearing must be held within seven days, exclusive of weekends and holidays, after the admission or application for admission. Counsel must be appointed if the minor is unrepresented. A guardian ad litem may also be appointed. *Id.* The court must provide notice of the hearing to the minor, the minor's counsel and guardian ad litem, and the parent or guardian at least 96 hours before the hearing. [Wis. Stat.](#) § 51.13(4)(e). The hearing must be on the record and follow the rules of evidence, and findings must be based on clear and convincing evidence. [Wis. Stat.](#) § 51.13(4)(f).

After the hearing, the court may do one of the following: (1) approve the admission; (2) order the minor to be placed in or transferred to a different facility, if the court finds that either treatment in the admitting facility is inappropriate for the minor's needs or the minor is not being treated under the least restrictive conditions to meet the minor's needs, and the transfer is approved by the parties specified in [Wis. Stat.](#) § 51.13(4)(g)1., 2., 3., and 4., as appropriate; (3) dismiss the petition and release the minor; (4) order the petition to be treated as a petition for civil commitment and refer it to the appropriate court; (5) proceed under [Wis. Stat.](#) § 51.67, if the minor is 14 years old or older and developmentally disabled, to determine whether protective placement or protective services would be appropriate; or (6) dismiss the petition and authorize filing a petition under [Wis. Stat.](#) § 48.25(3) or [Wis. Stat.](#) § 938.25(3). [Wis. Stat.](#) § 51.13(4)(g), (h). [Wis. Stat.](#) §§ 48.25(3) and 938.25(3) relate to children, unborn children, and juveniles in need of protection or services under [Wis. Stat.](#) § 48.13, 48.133, or 938.13. Any person aggrieved by the court's order or determination and directly affected by it may appeal to the court of appeals under [Wis. Stat.](#) § 809.30. [Wis. Stat.](#) § 51.13(5).

3. Short-Term Admissions [§ 8.13]

Short-term admissions of 12 days or less generally do not require court review. [Wis. Stat.](#) § 51.13(6)(a)1. An exception applies when the minor is 14 years old or older and the admission is made by the minor's parent or guardian because the minor refuses to consent to the admission, [Wis. Stat.](#) § 51.13(6)(a)2.; in this situation, the facility must file a petition for review and a hearing must be held as described in section 8.12, *supra*. See [Wis. Stat.](#) § 51.13(4). After the 12-day period has ended, the minor must be released unless an application is filed for voluntary admission, see [Wis. Stat.](#) § 51.13(1), or the necessary paperwork is filed for an emergency detention, civil commitment, or protective placement. [Wis. Stat.](#) § 51.13(6)(c). If a minor 14 years old or older who refused to execute the application is admitted after court review, the minor cannot be readmitted to an inpatient treatment facility for another short-term admission within 120 days after the previous short-term admission. [Wis. Stat.](#) § 51.13(6)(a)3.

4. Discharge [§ 8.14]

A minor who is under 14 years old, or a minor who is 14 years old or older and admitted for treatment of alcoholism or drug abuse, may be discharged from an inpatient facility upon the request of a parent or guardian. [Wis. Stat.](#) § 51.13(7)(b)2. A minor 14 years old or older who was admitted for treatment of mental illness or developmental disability may request discharge along with the minor's parent or guardian. [Wis. Stat.](#) § 51.13(7)(b)3. In all these cases, the minor must be released within 48 hours after the submission of the request, exclusive of weekends or holidays, unless a statement or petition is filed for emergency detention, civil commitment, or protective placement. [Wis. Stat.](#) § 51.13(7)(b)5.

If a minor 14 years old or older who was admitted for treatment for mental illness or developmental disability requests discharge on the minor's own behalf, discharge may be denied if the parent or guardian refuses to join in requesting the discharge and if the director of the facility makes a written statement (1) that the minor is in need of treatment, (2) that the facility is providing treatment that meets the minor's needs, and (3) that it is under the least restrictive conditions consistent with the minor's needs. [Wis. Stat.](#) § 51.13(7)(b)3. Thus, the minor may be kept in the facility without the filing of the paperwork needed for involuntary commitment unless a written request for a court hearing is filed as described below. See also *supra* § 8.12. A minor of any age may request discharge if the minor was admitted pursuant to court approval because the parent or guardian could not be found, there was no parent with legal custody, or the parent refused to consent. The minor must be discharged within 48 hours after the submission of the request, exclusive of weekends and holidays, unless a statement or petition is filed for emergency detention, civil commitment, or protective placement. [Wis. Stat.](#) § 51.13(7)(b)1., 5.

A minor who is denied discharge may submit a written request to the court for a hearing to determine the continued appropriateness of the admission. [Wis. Stat.](#) § 51.13(7)(c). The minor does not have to write the request, but the minor does have to sign it. If the staff or director of the facility receives such a request, the director must file it with the court. Also, if the staff or the director observes conduct—such as an unauthorized absence or a written opinion—that demonstrates that the minor no longer wants to be at the facility, the facility director must file a written request to the court to determine the continued appropriateness of the admission. *Id.* The court must hold a hearing, *see* [Wis. Stat.](#) § 51.13(4)(d), as described in section [8.12](#), *supra*, within 14 days after the receipt of the request, unless the parties request an extension. A hearing does not have to be held if such a hearing was held within the past 120 days before the request. [Wis. Stat.](#) § 51.13(7)(c). The minor has the right to an independent evaluation and court-appointed counsel; a guardian ad litem may also be appointed. *See* [Wis. Stat.](#) § 51.13(4)(d). After the hearing, the court can make the same dispositions as permitted under the hearing to review admission. [Wis. Stat.](#) § 51.13(7)(c), (4)(h).

5. Role of the Guardian ad Litem [§ 8.15]

If a hearing is held under [Wis. Stat.](#) § 51.13(4)(d) to review the appropriateness of either the admission or the request for discharge, the child must be provided with counsel; the appointment of a guardian ad litem is discretionary. [Wis. Stat.](#) § 51.13(4)(d), (7)(c). As in other areas of guardian ad litem work, an appointed guardian ad litem will have the job of investigating the situation and presenting to the court what the guardian ad litem feels is in the individual's *best interests*. This requires knowledge of the various legal alternatives—voluntary admission, civil commitment, protective placement, or a [Wis. Stat.](#) ch. 48 or 938 proceeding. For further information on these alternatives, *see* sections [8.19–8.36](#), *infra* (civil commitment); [chapter 7](#), *supra* (protective placement); and [chapter 4](#), *supra* ([Wis. Stat.](#) ch. 48 proceedings).

In addition, the guardian ad litem needs information about the child's disability and service needs and about the resources available to treat the disability. Because a significant number of children admitted to facilities for mental disability have dual problems—mental illness and developmental disability, or mental illness and drug or alcohol abuse—obtaining the information may become extremely complex. *See supra* [ch. 5](#) (information on nature of mental disabilities). As in other areas, it is crucial to find a skilled evaluator who can provide an assessment of the child's condition and can make recommendations about treatment programs. For information on evaluations and obtaining them, *see* [chapters 2](#) and [5](#), *supra*. Then, the guardian ad litem must be prepared to negotiate with the service delivery system to try to develop a plan for the appropriate services. Because children may be involved with a variety of organizations and agencies, particularly schools and county social services, as well as providers of mental health services, the guardian ad litem may need some expert assistance. Advocacy agencies such as Disability Rights Wisconsin, which provides advocacy for minors with disabilities, or Wisconsin Family Ties, which provides advocacy for families of children with serious emotional disturbances, may be able to provide help. For more information on service needs and support systems, *see* [chapters 2](#) and [5](#), *supra*. *See also* [chapter 4](#), *supra*, for a sample authorization for release of children's medical and nonmedical records.

For information on the payment of the guardian ad litem, *see* [chapter 7](#), *supra*.

III. Outpatient Treatment of Minors [§ 8.16]

A. Review of Outpatient Mental Health Treatment of Minors [§ 8.17]

Minors 14 years old or older or a person acting on their behalf may petition the mental health review officer in the county where the parents or guardian reside for a review of a refusal or inability of the minor's parent or guardian to provide informed consent for outpatient mental health treatment. [Wis. Stat.](#) § 51.14(3). Each court assigned to exercise jurisdiction under [Wis. Stat.](#) chs. 48 and 938 must have a mental health review officer. [Wis. Stat.](#) § 51.14(2). A list of the mental health review officers in each county is posted on the Wisconsin Department of Health Services (DHS) website. [Wis. Stat.](#) § 51.14(7); DHS, *Client Rights: Mental Health Review Officers*, <https://www.dhs.wisconsin.gov/clientrights/mhro.htm> (last revised Aug. 12, 2024). A petition for review must also be filed if the parent or guardian has consented to outpatient treatment but the minor has refused or if emergency outpatient mental health treatment has been provided but consent of the minor, parent, or guardian has not been obtained. [Wis. Stat.](#) § 51.14(3)(a); *see infra* [§ 8.18](#).

A petition for review of a minor's outpatient mental health treatment must include facts substantiating the belief that the minor does or does not need treatment, any available information to substantiate the appropriateness of the particular treatment and that it is the least restrictive treatment consistent with the needs of the minor, and any professional evaluations. [Wis. Stat.](#) § 51.14(3)(b), (c). The court must ensure that the necessary assistance is provided to the petitioner in the preparation of the petition. [Wis. Stat.](#)

§ 51.14(3)(d). A hearing must be held within 21 days after the filing of the petition if the minor's parent or guardian refused or was unable to provide informed consent or if the minor refuses to consent. [Wis. Stat. § 51.14\(3\)\(g\)](#).

If after the hearing and after taking into consideration the recommendations, if any, of the county department, the mental health review officer may issue a written order that the outpatient mental health treatment for the minor is appropriate. The order must include written findings that consent was unreasonably withheld, the minor needs treatment, and the particular treatment sought is appropriate for the minor, is the least restrictive treatment available, and is in the best interests of the minor. [Wis. Stat. § 51.14\(3\)\(h\)–\(i\)](#). Within 21 days after the issuance of the order by the mental health review officer, the minor or the person acting on behalf of the minor may petition the court for review. [Wis. Stat. § 51.14\(4\)\(a\)](#).

B. Emergency Outpatient Treatment of Minors [§ 8.18]

An outpatient mental health treatment provider may provide treatment to a minor for up to 30 days without first obtaining informed consent under certain circumstances. [Wis. Stat. § 51.138](#). There must be an emergency as determined by the treatment director, or time and distance preclude obtaining written consent before undertaking treatment, and there is a potential for harm to the minor or others if treatment is not initiated before written consent is obtained. [Wis. Stat. § 51.138\(2\)\(a\)](#). Additionally, a reasonable effort must be made to obtain consent from a parent or guardian of the minor before initiating treatment. [Wis. Stat. § 51.138\(2\)\(b\)](#). During this 30-day treatment period, the treatment director must either obtain informed written consent of a parent, a guardian, or the minor or, if consent is not obtained, file a petition to initiate a review under [Wis. Stat. § 51.14](#). [Wis. Stat. § 51.138\(3\)](#).

Prescription of medications to the minor is not allowed during this period without the consent of a parent, a guardian, or the minor. [Wis. Stat. § 51.138\(4\)](#). The minor cannot be admitted to an inpatient facility without the consent of a parent or guardian. *Id.* When the consent of the parent or guardian has not been obtained, the cost of treatment services provided during this period can be billed to a third party with the minor's consent. If the minor does not consent, the minor will be responsible for paying for the services. [Wis. Stat. § 51.138\(5\)](#).

IV. Involuntary Civil Commitment [§ 8.19]

A. Standards for Commitment for Mental Illness, Developmental Disability, or Drug Dependence [§ 8.20]

1. In General [§ 8.21]

Civil commitment means that a person's liberty may be curtailed by placement in a locked psychiatric facility and, under certain circumstances, the person may be treated involuntarily. Under [Wis. Stat. § 51.20\(1\)\(a\)](#), the following conditions must be satisfied for a person to be civilly committed: (1) mental illness, developmental disability, or drug dependence; (2) treatability; and (3) dangerousness.

2. Mental Illness [§ 8.22]

For the purposes of involuntary commitment, the Mental Health Act defines *mental illness* as “a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.” [Wis. Stat. § 51.01\(13\)\(b\)](#). In the context of a commitment hearing, whether a person has a mental illness to satisfy [Wis. Stat. § 51.20\(1\)\(a\)2](#) is a legal, not medical, determination. *See State v. Post*, [197 Wis. 2d 279](#), 305, [541 N.W.2d 115](#) (1995) (indicating that definition of mental illness “serve[s] a legal, not medical, function”). A finding that an individual has a mental illness “does not turn on whether the person satisfies the criteria for a particular mental disorder set forth in the [*Diagnostic and Statistical Manual*].” *Waukesha County v. G.M.M. (In re Mental Commitment of G.M.M.)*, No. [2022AP1207](#), 2023 WL 223496, ¶ 19 (Wis. Ct. App. Jan. 18, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

3. Treatability [§ 8.23]

The second condition of the civil commitment standard of [Wis. Stat. § 51.20\(1\)\(a\)](#) provides that an individual must be found to be a “proper subject of treatment” to justify commitment. [Wis. Stat. § 51.20\(1\)\(a\)1](#). The Wisconsin Supreme Court considered the treatability criterion in *Fond du Lac County v. Helen E.F. (In re Commitment of Helen E.F.)*, [2012 WI 50](#), [340 Wis. 2d 500](#), [814 N.W.2d 179](#). The court applied a fact-based test to determine whether a patient who had been diagnosed with Alzheimer’s disease was capable of rehabilitation and therefore treatable as required under [Wis. Stat. ch. 51](#)’s commitment standards. In determining that the only medical remedy for the patient was maintenance, not treatment, the court found that she was not a proper subject of treatment under [Wis. Stat. ch. 51](#) and that she could be better served under the protective placement scheme of [Wis. Stat. ch. 55](#). *Id.* ¶¶ 37–39. The court, however, did not rule out an involuntary commitment under [Wis. Stat. ch. 51](#) of someone with a diagnosis of Alzheimer’s disease if that individual also was found to have a qualifying mental illness under [Wis. Stat. ch. 51](#). *Id.* ¶ 40; *see also infra* § [8.35](#) (switching to protective placement from civil commitment).

In *Waukesha County v. J.W.J. (In re Mental Commitment of J.W.J.)*, [2017 WI 57](#), [375 Wis. 2d 542](#), [895 N.W.2d 783](#), the Wisconsin Supreme Court attempted to clarify the distinction between rehabilitation and habilitation in the context of psychiatric disorders and mental commitment. The case involved the appeal of a recommitment order that included the involuntary administration of psychotropic medication. The patient asserted that he was not “a proper subject for treatment” within the meaning of [Wis. Stat. § 51.20\(1\)](#). *Id.* ¶ 21. Ultimately, the court distinguished rehabilitation from habilitation based on whether the focus of treatment is internal to the individual or external. *Id.* ¶ 35. Under the court’s analysis, habilitation involves interventions that help the individual deal with external things, such as activities of daily living. Rehabilitation, on the other hand, concerns improving an individual’s condition through the amelioration of internal factors, such as symptoms and behaviors. *Id.* ¶ 36. The court also clarified the definition of “rehabilitative potential,” under *Helen E.F.*, [2012 WI 50](#), [340 Wis. 2d 500](#), by saying that if a treatment is effective enough to regulate the individual’s symptoms to the extent that it could keep the individual from a more restrictive treatment alternative, then the treatment can control enough symptoms to establish that the individual has rehabilitation potential. *J.W.J.*, [2017 WI 57](#), ¶ 41, [375 Wis. 2d 542](#); *see also Marathon Cnty. v. P.X. (In re Condition of P.X.)*, No. [2017AP1497](#), 2017 WL 3155825 (Wis. Ct. App. June 26, 2018) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (affirming commitment and holding that patient with co-occurring conditions of developmental disabilities and mental disorders was capable of rehabilitation under [Wis. Stat. ch. 51](#)).

It is possible, however, for an individual with a serious and persistent mental illness to be protectively placed under [Wis. Stat. ch. 55](#). A mental illness has been held to be a permanent disability because of a “continuing inability or refusal to address it or assist in treating it.” *K.N.K. v. Buhler (In re Guardianship of K.N.K.)*, [139 Wis. 2d 190](#), 202, [407 N.W.2d 281](#) (Ct. App. 1987). In that case, the court found a need for more than active treatment under [Wis. Stat. ch. 51](#) to the extent that the primary need was for residential care and custody pursuant to former [Wis. Stat. § 55.06\(2\)\(a\)](#) (now [Wis. Stat. § 55.08\(1\)\(a\)](#)). *Id.* Citing *K.N.K.* extensively, the court of appeals held that M.S., an individual with a serious and persistent mental illness, met the standard for a protective placement under [Wis. Stat. ch. 55](#), even though the county could have filed a petition under [Wis. Stat. ch. 51](#). *Waukesha Cnty. Dep’t of Health & Hum. Servs. v. M.S. (In re Guardianship & Protective Placement of M.S.)*, No. [2022AP2065](#), 2023 WL 5743040 (Wis. Ct. App. Sept. 6, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)). “Which path to pursue—ch. 55 or ch. 51—is an executive decision made by the County, not the courts.” *Id.* ¶ 6.

4. Dangerousness Standards [§ 8.24]

a. In General [§ 8.25]

Dangerousness may be satisfied by meeting any one of five different tests, commonly referred to as commitment *standards*:

1. A substantial probability of physical harm to the person, evidenced by recent attempts at or threats of suicide or serious bodily harm;
2. A substantial probability of physical harm to others, manifested (a) by evidence of recent homicidal or other violent behavior; or (b) by evidence that others are placed in reasonable fear of violent behavior or physical harm to them, based on evidence of a recent overt act, attempt, or threat to do serious physical harm;

Note. When evaluating the probability that a person will harm others, the threat of harm need not be made in the presence of the person threatened nor does the person threatened have to be aware of the threat. *R.J. v. Winnebago Cnty. (In re R.J.)*, [146 Wis. 2d 516](#), [431 N.W.2d 708](#) (Ct. App. 1988).

3. A substantial probability of physical impairment or injury to the person or other individuals caused by impaired judgment, based on evidence of a pattern of recent acts or omissions;
4. A substantial probability that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the person receives prompt and adequate treatment for a mental illness; this substantial probability must be evidenced by behavior manifested by recent acts or omissions that, because of the mental illness, the individual is unable without treatment to satisfy basic needs for nourishment, medical care, shelter, or safety; or

Note. An individual's inability to keep a job, or reliance on family members, does not alone indicate an inability to satisfy the individual's basic needs under [Wis. Stat. § 51.20\(1\)\(a\)2.d.](#) such that substantial probability of death or serious injury exists. *Langlade Cnty. v. D.J.W. (In re Mental Commitment of D.J.W.)*, [2020 WI 41](#), [391 Wis. 2d 231](#), [942 N.W.2d 277](#); see also *Outagamie Cnty. Dep't of Health & Hum. Servs. v. M.D.H. (In re Mental Commitment of M.D.H.)*, No. [2020AP86](#), 2021 WL 2933229, ¶ 12 (Wis. Ct. App. July 13, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (distinguishing *D.J.W.* and noting that M.D.H.'s condition evidenced "far more serious danger"); *Portage Cnty. v. L.E. (In re Mental Commitment of L.E.)*, No. [2020AP1239-FT](#), 2020 WL 6325898 (Wis. Ct. App. Oct. 29, 2020) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (also distinguishing *D.J.W.*).

5. A fifth standard of dangerousness evidencing the following:

(a) Incapability, because of mental illness, of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives (after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to the person), or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to the person's mental illness to make an informed choice as to whether to accept or refuse medication or treatment; and

(b) A substantial probability, as demonstrated by both the individual's treatment history and the person's recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that the person will, if left untreated, lack services necessary for the person's health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over the person's thoughts or actions.

[Wis. Stat. § 51.20\(1\)\(a\)2.](#)

While the first three standards are applicable to individuals who are mentally ill, drug dependent, or developmentally disabled, the fourth and fifth standards are limited to situations in which the alleged behavior can be attributed to mental illness. The fifth standard, [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#), authorizes commitment only when a person with mental illness needs care or treatment to prevent deterioration but is unwilling or unable to make an informed choice to accept it. *State v. Dennis H. (In re Commitment of Dennis H.)*, [2002 WI 104](#), ¶ 39, [255 Wis. 2d 359](#), [647 N.W.2d 851](#). It is the only one of the five standards that does not require a second proceeding to order involuntary medication or treatment. [Wis. Stat. § 51.61\(1\)\(g\)3m.](#); see *infra* [§ 8.32](#).

b. Standard on Recommitment [§ 8.26]

If, immediately before the commencement of the proceedings, the individual has been the subject of inpatient treatment for mental illness, developmental disability, or drug dependence or outpatient treatment under a commitment order, the standard of dangerousness may be satisfied by showing that there is a substantial likelihood, based on the treatment record, that the individual would be the proper subject for commitment if treatment were withdrawn. See [Wis. Stat. § 51.20\(1\)\(am\)](#); *Marathon Cnty. v. T.R.H. (In re Mental Commitment of T.R.H.)*, No. [2022AP1394](#), 2023 WL 2484724 (Wis. Ct. App. Mar. 14, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (review denied).

Note. [Wis. Stat. § 51.20](#) uses "recommitment" and "extension of a commitment" interchangeably. *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, [2019 WI 54](#), ¶ 1 n.1, [386 Wis. 2d 672](#), [927 N.W.2d 509](#); see also *Outagamie Cnty. v. L.X.D.-O. (In re Mental Commitment of L.X.D.-O.)*, [2023 WI App 17](#), ¶¶ 18–19, [407 Wis. 2d 441](#), [991 N.W.2d 518](#) (review denied).

In *J.W.K.*, the Wisconsin Supreme Court made clear that an extension of a commitment requires the county to prove the same elements by clear and convincing evidence as in the original commitment. *Id.* ¶ 18. The alternative approach under [Wis. Stat. § 51.20\(1\)\(am\)](#) to show dangerousness does not change the elements or amount of proof required. It simply recognizes that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness outlined in [Wis. Stat. § 51.20\(1\)\(a\)2.a.–e.](#) *Id.* ¶ 24; *see also Waukesha Cnty. v. E.A.B. (In re Mental Commitment of E.A.B.)* No. [2021AP986-FT](#), 2021 WL 4073650 (Wis. Ct. App. Sept 8, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

Note. In concluding that the appeal of the recommitment order in *J.W.K.* was moot, the supreme court held that each commitment and subsequent recommitment order require the county to prove the same elements with the same quantum of proof. Therefore, reversing an expired order “would have no effect on subsequent recommitment orders because later orders stand on their own under the language of the statute.” *J.W.K.*, [2019 WI 54](#), ¶ 1, [386 Wis. 2d 672](#); *see also L.X.D.-O.*, [2023 WI App 17](#), [407 Wis. 2d 441](#).

In *Langlade County v. D.J.W. (In re Mental Commitment of D.J.W.)*, [2020 WI 41](#), [391 Wis. 2d 231](#), [942 N.W. 2d 277](#), the Wisconsin Supreme Court announced an additional requirement in recommitment proceedings. The circuit court must make specific factual findings with reference to the particular dangerousness test on which it is relying as the basis for recommitment. *Id.* ¶¶ 3, 40. In *D.J.W.*, it was not clear to the supreme court which subdivision of [Wis. Stat. § 51.20\(1\)\(a\)2.](#) the circuit court had used as the basis for either the original commitment or the recommitment. In addition, the general statements by the county’s expert about the patient’s inability to maintain a job, and the patient’s dependence on disability payments for income and on his family for housing, were insufficient to establish dangerousness under any theory the county had advanced. *D.J.W.*, [2020 WI 41](#), [391 Wis. 2d 231](#). Subsequently, in *Winnebago County v. S.H. (In re Mental Commitment of S.H.)*, [2020 WI App 46](#), ¶ 14, [393 Wis. 2d 511](#), [947 N.W.2d 761](#), the court clarified that the holding in *D.J.W.* was only to be applied prospectively.

The requirement of specific factual findings has been extended to all civil commitment cases in several unpublished appellate opinions. *See, e.g., Kenosha Cnty. v. L.A.T. (In re Mental Commitment of L.A.T.)*, No. [2022AP603](#), 2023 WL 152876, ¶ 39 (Wis. Ct. App. Jan. 11, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)); *Milwaukee Cnty. v. A.J.G. (In re Mental Commitment of A.J.G.)*, No. [2021AP1338](#), 2022 WL 1311669, ¶ 13 (Wis. Ct. App. May 3, 2022) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

In evaluating the sufficiency of the evidence supporting specific factual findings, courts have looked to the entire record for support. The court in *Waukesha County v. G.M.M. (In re Mental Commitment of G.M.M.)*, No. [2023AP1359](#), 2024 WL 1087208 (Wis. Ct. App. Mar. 13, 2024) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)), upheld recommitment, even though the circuit court failed to state sufficient findings to support the determination of dangerousness because there was sufficient evidence in the record to support that determination. *But see T.R.H.*, 2023 WL 2484724 (determining that evidence was insufficient to support commitment).

c. Exclusions [§ 8.27]

The third, fourth, and fifth standards cannot be used (1) if reasonable provision for the person’s protection is available in the community; (2) if the person may be provided protective services or protective placement under [Wis. Stat. ch. 55](#); or (3) in the case of a minor, if the person is appropriate for services or placement under [Wis. Stat. ch. 48](#) or [Wis. Stat. ch. 938](#). When determining whether “reasonable provision for the individual’s protection is available in the community,” the court must also determine whether there is a reasonable probability that the individual will take advantage of these services. In addition, the provision of food, shelter, or other care, to a person who is substantially incapable of obtaining the person’s own care, by any person other than a treatment facility, does not constitute reasonable provision for the person’s protection available in the community. [Wis. Stat. § 51.20\(1\)\(a\)2.c.–e.](#); *see also Wis. Stat. § 51.15(1)(ar)3.–4.* (emergency detention).

The court of appeals has held that the fifth standard’s [Wis. Stat. ch. 55](#) exclusion applies not only when the individual is under a [Wis. Stat. ch. 55](#) protective order but also when there are services available under [Wis. Stat. ch. 55](#), including involuntary administration of psychotropic medication, that would be effective. *Dane Cnty. v. Kelly M. (In re Commitment of Kelly M.)*, [2011 WI App 69](#), [333 Wis. 2d 719](#), [798 N.W.2d 697](#). For more information, see [chapters 7](#) (protective placement) and [4](#) ([Wis. Stat. ch. 48](#) services and placement), *supra*.

B. Standards for Commitment for Alcoholism and Drug Dependence [§ 8.28]

If the commitment is for alcoholism or drug dependence, a different standard is used. The petition for commitment must prove the following by clear and convincing evidence: (1) the condition of the person is such that the person habitually lacks self-control as to the use of alcohol beverages or other drugs and uses such beverages or drugs to the extent that health is substantially impaired or endangered and that social or economic functioning is substantially impaired; (2) the condition of the person is based on evidence of a pattern of conduct that is dangerous to the person or others; (3) there is a relationship between the alcoholic or drug-dependent condition and the pattern of conduct within the preceding 12 months that is dangerous to the person or others; and (4) there is an extreme likelihood that the pattern of conduct will continue or repeat itself without involuntary treatment or institutionalization. *See* [Wis. Stat. § 51.45\(13\)\(a\), \(g\)](#).

C. Overview of the Procedures [§ 8.29]

1. Commitment for Mental Illness, Developmental Disability, or Drug Dependence [§ 8.30]

Civil commitment for mental illness, developmental disability, or drug dependence may be initiated by emergency detention or by a three-party petition. In the case of drug dependence, procedures for emergency detention and involuntary commitment exist under [Wis. Stat. §§ 51.15 and 51.20](#) as well as under [Wis. Stat. § 51.45](#) (prevention and control of alcoholism and drug dependence). Under a [Wis. Stat. § 51.15](#) emergency detention, conduct leading a law enforcement officer to believe that the person may meet the standard for commitment must be observed by or reliably reported to the law enforcement officer. [Wis. Stat. § 51.15\(1\)\(ar\), \(b\)](#). Note that the standard in [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#) cannot be used for emergency detentions. *See* 2001 Wis. Act 16, § 1966e (repealing [Wis. Stat. § 51.15\(1\)\(a\)5.](#) (1999–2000)). If the officer has cause to believe that (1) the person is mentally ill, drug dependent, or developmentally disabled; (2) the person meets the standard, *see* [Wis. Stat. § 51.15\(1\)\(ar\)1.–4.](#); and (3) taking the person into custody is the least restrictive alternative appropriate to the person's needs, the officer may take the person into custody and transport the person, or cause the person to be transported by contract with another party, for detention if the county department of community programs in the county in which the individual was taken into custody approves of the need for detention. [Wis. Stat. § 51.15\(1\), \(2\)\(a\)](#).

The county department may approve detention only if it reasonably believes that the individual will not voluntarily consent to an evaluation, diagnosis, and treatment necessary to remove the substantial probability of harm underlying the detention. [Wis. Stat. § 51.15\(2\)\(c\)](#). In addition to county approval, a crisis assessment must be performed by a psychiatrist, psychologist, or other department-approved mental health professional, and this professional must agree with the need for detention. This assessment may be conducted in person, by telephone, or by telemedicine or videoconferencing technology. *Id.* Detention may only be in (1) a treatment facility approved by the DHS or the county department, if the facility agrees to accept the individual; or (2) a state treatment facility. [Wis. Stat. § 51.15\(2\)\(d\)](#).

If the individual is in a hospital emergency department, a law enforcement officer cannot transport the individual for detention until a hospital employee or medical staff member treating the individual determines that the transfer is medically appropriate and communicates that determination to the law enforcement officer. [Wis. Stat. § 51.15\(2\)\(b\)](#).

In all counties except Milwaukee County, the officer must file a statement of emergency detention with the court. [Wis. Stat. § 51.15\(5\)](#). In Milwaukee County, the facility treatment director or designee has 24 hours to determine whether to release or detain the individual. [Wis. Stat. § 51.15\(4\)](#). Any period delaying the treatment director's determination that is directly attributable to evaluation or treatment of nonpsychiatric medical conditions is excluded from calculating the 24-hour period. [Wis. Stat. § 51.15\(4\)\(c\)](#). If the decision is to detain the individual, the treatment director or a designee may supplement the statement of the police officer with specific information about why the individual meets the standard for commitment and then must promptly file the officer's statement and any supplemental documents with the court. [Wis. Stat. § 51.15\(4\)\(b\)](#).

In all counties, the person may be detained for up to 72 hours (excluding weekends and holidays). [Wis. Stat. § 51.15\(4\)\(b\), \(5\)](#). The 72-hour-detention period begins when the individual is taken into custody, *see* [Wis. Stat. § 51.15\(4\)\(b\), \(5\)](#), and that custody begins as soon as the individual is under the physical control of the law enforcement officer for purposes of emergency detention. [Wis. Stat. § 51.15\(4\)\(b\)](#). Transportation can be by a law enforcement agency, an ambulance service provider, or a third-party vendor contracting with the county. [Wis. Stat. § 51.15\(2\)\(a\)](#). The individual is considered to be in the custody of the transporting law enforcement agency during transport for purposes of emergency detention. [Wis. Stat. § 51.15\(3\)](#).

Note. [Wis. Stat.](#) § 51.15(3) does not specifically address custody in cases involving transportation under contracts with ambulance service providers and third-party vendors.

Custody is transferred to the facility upon arrival there. [Wis. Stat.](#) § 51.15(3). A hearing must then be scheduled and held within 72 hours to determine whether there is probable cause to believe the person meets the commitment standard. [Wis. Stat.](#) §§ 51.15(4)(b), (5), 51.20(7)(a).

[Wis. Stat.](#) § 51.20(7)(a) provides that the probable-cause hearing may be postponed at the request of the subject individual or the individual's counsel, but in no case may the postponement exceed seven days from the date of the detention. In *Jefferson County v. S.M.S. (In re Condition of S.M.S.)*, No. [2020AP814](#), 2021 WL 922486 (Wis. Ct. App. Mar. 11, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), however, the court clarified that when the probable-cause hearing had begun on the seventh day, the court did not lose competency to conclude the hearing on the eighth day given that an adjournment was necessitated by S.M.S.'s conduct and litigation strategy.

Under a three-party petition, three adults must allege that the person meets the standard for commitment. [Wis. Stat.](#) § 51.20(1)(b). The court must review the petition within 24 hours after it is filed (excluding weekends and holidays) to determine whether to detain the person. [Wis. Stat.](#) § 51.20(2); *see also* [Wis. Stat.](#) § 51.20(1)(c). If the person is detained, the probable-cause hearing must be held within 72 hours after the individual is taken into custody (again excluding weekends and holidays). [Wis. Stat.](#) § 51.20(7)(a). If the person is not detained, the hearing must be held within a reasonable time after the filing of the petition. [Wis. Stat.](#) § 51.20(7)(b). Corporation counsel has the obligation to represent the interests of the public and prepare all necessary papers; however, if corporation counsel does not believe that involuntary commitment is appropriate in a case, then corporation counsel must inform the person seeking the petition that the person may discontinue pursuing the involuntary commitment or may continue with corporation counsel filing the petition under a limited appearance, which includes a certification to the court that corporation counsel does not support the petition. [Wis. Stat.](#) § 51.20(4)(b). *But see* [Wis. Stat.](#) § 51.20(4)(c) (providing that limited-appearance provision in [Wis. Stat.](#) § 51.20(4)(d) does not apply to emergency-detention proceedings under [Wis. Stat.](#) § 51.15(4), (5), or (10)).

The person who is the subject of a [Wis. Stat.](#) § 51.20 petition has a right to a copy of the petition or detention order, notice of all hearings, adversary counsel, to present and cross-examine witnesses, to remain silent when being examined, an open hearing, and a six-person jury trial at the final hearing. [Wis. Stat.](#) § 51.20(2), (3), (5), (11), (12). The request for a jury trial must be made at least 48 hours before the time set for the final hearing. [Wis. Stat.](#) § 51.20(11)(a). When the final hearing is rescheduled, a jury demand can still be filed up to 48 hours before the rescheduled hearing. *Waukesha Cnty. v. E.J.W. (In re Mental Commitment of E.J.W.)*, [2021 WI 85](#), [399 Wis. 2d 471](#), [966 N.W.2d 590](#). The Wisconsin Supreme Court has held that the commitment hearing provision for a six-person jury with a five-sixths verdict does not violate the equal-protection guarantees of the U.S. or Wisconsin Constitutions. *Milwaukee Cnty. v. Mary F.-R. (In re Mental Commitment of Mary F.-R.)*, [2013 WI 92](#), [351 Wis. 2d 273](#), [839 N.W.2d 581](#) (interpreting [Wis. Stat.](#) § 51.20(11)).

Note. The question whether the ruling in *E.J.W.* was intended to be applied only prospectively was addressed by the Wisconsin Supreme Court in *Walworth County v. M.R.M. (In re Mental Commitment of M.R.M.)*, [2023 WI 59](#), [408 Wis. 2d 316](#), [992 N.W.2d 809](#), in which it ruled that the holding in *E.J.W.* would apply retroactively, and a reversal of the extension order was proper.

A person facing civil commitment or recommitment may waive the right to adversary counsel and may self-represent. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, [162 Wis. 2d 320](#), [469 N.W.2d 836](#) (1991). The circuit court must determine, however, whether the person is competent to make the choice to be unrepresented, including whether the waiver was knowing and voluntary and whether the person possesses the minimal competency necessary to conduct the person's own defense. To assess the person's competency, the court should consider various factors, including the following: the person's education; literacy; fluency in English; and any physical or mental disability that may significantly affect the person's ability to provide the person's own defense. *Id.* at 336–37. If it appears that the person is incompetent to make this decision, a guardian ad litem may be needed to assist the court in determining whether the person understands the nature of the proceedings and the role of adversary counsel, whether the person's decision is in fact voluntary, and so forth.

If probable cause is found, the person may be detained until the final hearing or released into the community, often with the condition that the person agree to receive treatment until the full hearing takes place. *See* [Wis. Stat.](#) § 51.20(8). If the person is detained, the final hearing must be held within 14 days after detention. If the person is not detained, the hearing must be held within 30 days after the probable-cause hearing. [Wis. Stat.](#) § 51.20(7)(c). As a general rule, if the final hearing is not held within this time

frame, the court loses jurisdiction, and the petition must be dismissed. *State ex rel. Lockman v. Gerhardstein*, [107 Wis. 2d 325](#), [320 N.W.2d 27](#) (Ct. App. 1982). The court of appeals held in *County of Milwaukee v. Edward S. (In re Mental Commitment of Edward S.)*, [2001 WI App 169](#), [247 Wis. 2d 87](#), [633 N.W.2d 241](#), that this rule does not apply when the delay in the hearing is caused by the action of the detained subject of the hearing. In *Edward S.*, the subject had fired his attorney on the day before the final hearing was scheduled, thus causing a delay in when the final hearing was held; the court of appeals held that the delay did not require dismissal of the commitment petition.

During the time between the probable-cause hearing and the final hearing, the person must be examined by two psychiatric examiners; the person also has a right to request an independent examination. [Wis. Stat. § 51.20\(9\)](#).

Many cases are settled by treatment agreements reached by the individual, the individual's counsel, and the attorney for the county, either at the probable-cause hearing or at some time between the probable-cause hearing and the final hearing. Under a statutorily permitted settlement agreement, the probable-cause or final-commitment hearing can be suspended for up to 90 days if the person (or the person's counsel with the person's consent) agrees to obtain treatment. [Wis. Stat. § 51.20\(8\)\(bg\)](#). The settlement agreement must be in writing, contain a treatment plan, and be approved by the court. *Id.* The county department of community programs must monitor the person's compliance with the agreement. *Id.* If the person fails to comply, the attorney for the county may file with the court a statement of noncompliance. [Wis. Stat. § 51.20\(8\)\(bm\)](#). Upon receipt of this statement, the court may issue an order to detain the person. *Id.* The court must hold a probable-cause hearing within 72 hours (exclusive of weekends or holidays) after the person is taken into custody under [Wis. Stat. § 51.15](#) for noncompliance under [Wis. Stat. § 51.20\(8\)\(bm\)](#). However, if a probable-cause hearing was held before the approval of the settlement agreement, then the court must hold a final hearing within 14 days from the time of detention. *Id.* The person also has a right to a hearing on the issue of noncompliance. [Wis. Stat. § 51.20\(8\)\(br\)](#).

At any time before the final commitment order, the individual may decide to enter into a stipulation agreement. The circuit court may engage in a colloquy with the individual to establish that the stipulation agreement is knowingly, intelligently, and voluntarily made. *See Dane Cnty. v. N.W. (In re Mental Commitment of N.W.)*, 2018AP688-NM, 2018 WL 11431364 (Oct. 9, 2018) (summary disposition order not citable per [Wis. Stat. § 809.23\(3\)](#)). A valid stipulation to dangerousness can satisfy the statutory requirement on dangerousness. *Kenosha Cnty. v. L.A.T. (In re Mental Commitment of L.A.T.)*, No. [2022AP603](#), 2023 WL 152876, ¶ 41 (Wis. Ct. App. Jan. 11, 2023) (unpublished opinion citable per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

At the final hearing, the petitioner has the burden of proving all required facts by clear and convincing evidence. [Wis. Stat. § 51.20\(13\)\(e\)](#). Expert testimony regarding dangerousness given during the hearing cannot include statements that merely describe events written in the medical records but about which the expert has no personal knowledge. Although such facts may be relied on to form the basis of the expert's opinion, *see* [Wis. Stat. § 907.03](#), they cannot be disclosed to the jury because they remain inadmissible hearsay. *Rusk Cnty. v. A.A. (In re Mental Commitment of A.A.)* Nos. [2019AP839](#), [2020AP1580](#), 2021 WL 4256189 (Wis. Ct. App. July 20, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (citing *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, [162 Wis. 2d 320](#), [469 N.W.2d 836](#) (1991)).

In an unpublished opinion, the court of appeals held that yelling and goading another patient, irrespective of how dangerous that other person might be, does not, without more, constitute evidence that an individual is a danger or threat to anyone within the meaning of [Wis. Stat. § 51.20\(1\)\(a\)2](#). *Milwaukee Cnty. v. Cheri V. (In re Mental Commitment of Cheri V.)*, No. [2012AP1737](#) (Wis. Ct. App. Dec. 18, 2012) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)). If the court finds that the person does meet the criteria for commitment, the court will order the person committed to the appropriate county department for an initial period of up to six months. Subsequent consecutive orders of commitment may be for a period not to exceed one year. [Wis. Stat. § 51.20\(13\)\(a\)3., \(g\)1](#). A person committed under the standard in [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#) may be treated as an inpatient for only 30 days at a time. [Wis. Stat. § 51.20\(13\)\(g\)2d](#).

A person under a commitment order may receive inpatient or outpatient treatment, and the county department must provide treatment in the least restrictive appropriate environment. [Wis. Stat. §§ 51.20\(13\)\(c\)2., \(f\), 51.22\(5\)](#). The court must designate the facility where the person is to be treated initially and designate the maximum level of inpatient care, if any, that may be used. [Wis. Stat. § 51.20\(13\)\(c\)1., 2](#). The court can also commit the person to outpatient treatment involving the use of psychotropic medication if the person also meets the standards for involuntary treatment. [Wis. Stat. § 51.20\(13\)\(dm\)](#). The county department must report its initial plan of treatment to the court. [Wis. Stat. § 51.20\(13\)\(c\)3](#).

After the initial court placement, the county department may transfer a patient or resident who is committed to it between treatment facilities, or between a treatment facility and the community if the transfer is consistent with reasonable medical and

clinical judgment and the requirement of [Wis. Stat. § 51.22\(5\)](#) to provide the least restrictive treatment alternative appropriate to the patient's needs. [Wis. Stat. § 51.35\(1\)\(a\)](#). If the transfer is to a setting that allows more personal freedom, the patient can be required to take medication or receive treatment, subject to the right to refuse under [Wis. Stat. § 51.61\(1\)\(g\)](#) and (h), as a condition of the transfer. [Wis. Stat. § 51.35\(1\)\(a\)](#). The patient must be informed that failure to comply with this condition may result in a return to a more restrictive setting. *Id.* Whenever the transfer results in greater restriction of personal freedom for the individual, and whenever the patient is transferred from outpatient to inpatient status, the patient must be informed orally and in writing that the patient has a right to contact an attorney and a member of the patient's immediate family, a right to receive assistance of counsel, and a right to petition a court in the county where the individual is located or the committing court for a review of the transfer. [Wis. Stat. § 51.35\(1\)\(e\)1](#). If a transfer to a more restrictive setting is for 5 days or more and is based on the patient's violation of a term or condition of a prior transfer to a less restrictive setting, the patient is entitled to a hearing—within 10 days after the transfer to the more restrictive setting—on whether there was, in fact, a violation of the prior condition or term. [Wis. Stat. § 51.35\(1\)\(e\)2](#), 3. The hearing is before a hearing officer designated by the director of the facility to which the individual has been transferred. [Wis. Stat. § 51.35\(1\)\(e\)3](#). The Wisconsin Supreme Court has explicitly confirmed that the 10-day requirement for holding a hearing under [Wis. Stat. § 51.35\(1\)\(e\)](#) does not apply to transfers from outpatient to inpatient status that are based on reasonable medical and clinical judgment, and a hearing within 10 days is only required when the transfer is based on alleged violations of conditions related to a previous transfer to a less restrictive treatment setting. *Manitowoc Cnty. v. Samuel J.H. (In re Mental Commitment of Samuel J.H.)*, [2013 WI 68](#), [349 Wis. 2d 202](#), [833 N.W.2d 109](#).

Because initial commitment orders expire after six months and recommitment orders at the end of one year, see [Wis. Stat. § 51.20\(13\)\(g\)](#), many people who appeal such orders will no longer be subject to them by the time of the appeal, making it difficult to receive appellate review on the merits of the order. Generally, an appeal will be deemed moot when the resolution of an issue will have no practical effect on the underlying controversy. *Portage Cnty. v. J.W.K. (In re Mental Commitment of J.W.K.)*, [2019 WI 54](#), [386 Wis. 2d 672](#), [927 N.W.2d 509](#). In concluding that the appeal of that recommitment order was moot, the court in *J.W.K.* specifically stated that its mootness holding was limited to situations in which no collateral implications of the commitment order were raised. *Id.* ¶ 28 n.11.

After *J.W.K.*, the Wisconsin Supreme Court recognized that there are at least two collateral consequences of an expired recommitment order that could keep an appeal from being considered moot: (1) the restriction of one's constitutional right to bear arms, and (2) the person's mandatory liability for the cost of care received during a recommitment. *Sauk Cnty. v. S.A.M. (In re Mental Commitment of S.A.M.)*, [2022 WI 46](#), ¶¶ 3, 21–27, [402 Wis. 2d 379](#), [975 N.W.2d 162](#). The court explained that “whether a collateral consequence renders an appeal not moot turns on the existence of a ‘causal relationship’ between a legal consequence and the challenged order.” *Id.* ¶ 20; see also *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, [2020 WI 8](#), [390 Wis. 2d 50](#), [937 N.W.2d 901](#) (holding that continuing firearms ban rendered initial commitment appeal not moot); *Rock Cnty. v. J.J.K. (In re Commitment of J.J.K.)*, No. [2020AP1085](#), 2021 WL 1684788, ¶ 29 (Wis. Ct. App. Apr. 29, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (holding that fact that there was also a separate firearms ban under domestic violence order did not negate collateral consequence of firearm ban in commitment order). *But see Waukesha Cnty. v. H.M.B. (In re Mental Commitment of H.M.B.)*, No. [2020AP570](#), 2020 WL 5542100 (Wis. Ct. App. Sept. 16, 2020) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (holding that matters stipulated to in circuit court's commitment proceedings cannot form basis for collateral consequences that would provide exception to mootness on appeal). The potential for collateral consequences associated with a commitment order is not present, however, in the appeal of an involuntary medication order. *Outagamie Cnty. v. L.X.D.-O. (In re Mental Commitment of L.X.D.-O.)*, [2023 WI App 17](#), ¶ 14, [407 Wis. 2d 441](#), [991 N.W.2d 518](#) (review denied).

An additional line of cases holds that the court may overlook mootness in an appeal of an order of commitment or recommitment under [Wis. Stat. ch. 51](#) if the issue falls into one of the five established mootness exceptions. *D.K.*, [2020 WI 8](#), ¶ 19, [390 Wis. 2d 50](#); *Outagamie Cnty. v. X.Z.B. (In re Mental Commitment of X.Z.B.)*, No. [2020AP2058](#), 2021 WL 2551304, ¶ 19 (Wis. Ct. App. June 22, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

2. Commitment for Alcoholism and Drug Dependence [§ 8.31]

Commitments for alcoholism and drug dependence under [Wis. Stat. § 51.45](#) differ from those for mental illness, developmental disability, or drug dependence under [Wis. Stat. § 51.20](#). An emergency commitment for alcoholism or drug dependence under [Wis. Stat. § 51.45](#) may be initiated by a physician, spouse, guardian, relative, or any interested person petitioning the court. [Wis. Stat. § 51.45\(12\)\(b\)](#). Often the person is already in a detention facility where the person was taken for detoxification. See [Wis. Stat. § 51.45\(11\)](#). The standards for emergency alcoholism or drug-dependence commitment require that a person (1) be intoxicated and have threatened, attempted, or inflicted physical self-harm or harm on others; or (2) be incapacitated by alcohol or another drug. [Wis.](#)

[Stat.](#) § 51.45(12)(a). The petition for commitment must be accompanied by one or more affidavits setting forth the factual basis for the petition. [Wis. Stat.](#) § 51.45(12)(b). On receipt of the petition and affidavits, the court or a circuit court commissioner must decide whether the person should be taken into protective custody and temporarily placed under the care of the county department of community programs. If the court so finds, the person may be taken to a treatment facility and a probable-cause hearing must be held within 48 hours, exclusive of weekends and holidays. [Wis. Stat.](#) § 51.45(12)(c)4.

Alternatively, commitment for alcoholism can be initiated by a three-party petition. [Wis. Stat.](#) § 51.45(13)(a). This procedure is more likely to be followed if the person is not already under detention. Three adults must allege that the person meets the standard for commitment. *See id.* The petition must be accompanied by affidavits setting forth the factual basis for the commitment. [Wis. Stat.](#) § 51.45(13)(a)4. The court may issue an order of temporary detention if the person is not already detained. [Wis. Stat.](#) § 51.45(13)(b)1. If temporary detention is used, the probable-cause hearing must be held within 72 hours (excluding weekends and holidays) after the person arrives at the approved public treatment facility. [Wis. Stat.](#) § 51.45(13)(b)4.

Although different statutes apply and some variations do exist, the procedures after the probable-cause hearing for an alcoholism or drug-dependence commitment under [Wis. Stat.](#) § 51.45 are quite similar to those for other civil commitments. *See* [Wis. Stat.](#) § 51.45(13)(c)–(g) (alcoholism and drug-dependence commitment procedures). A commitment under [Wis. Stat.](#) § 51.45 for alcoholism or drug dependence, however, lasts a maximum of 90 days, with the possibility of one six-month recommitment. [Wis. Stat.](#) § 51.45(13)(h). A commitment for mental illness, developmental disabilities, or drug dependence under [Wis. Stat.](#) § 51.20 generally lasts six months, with the possibility of unlimited recommitments of up to one year each. [Wis. Stat.](#) § 51.20(13)(g).

Note. It is possible to switch from a commitment under [Wis. Stat.](#) § 51.20 to one under [Wis. Stat.](#) § 51.45, or vice versa, at the probable-cause hearing. For this to happen, counsel for the petitioners must notify all other parties and the court, within a reasonable time before the hearing, of the intent to switch the proceedings, and the court must find probable cause that the person meets the appropriate standards. *See* [Wis. Stat.](#) §§ 51.20(7)(dm), 51.45(13)(dg).

Note. If the subject of the commitment is a minor, the court may appoint a guardian ad litem. [Wis. Stat.](#) § 51.45(2m)(c)1.

D. Involuntary Treatment [§ 8.32]

A civil commitment means that a person is committed to the appropriate county department to receive treatment. *See* [Wis. Stat.](#) §§ 51.20(13)(a)3., 51.61(1)(g). A civilly committed individual (or a person for whom the final commitment order is pending), however, retains the right to refuse psychotropic medication or other treatment, absent an emergency or a court finding that the person is not competent to refuse medication or treatment. Such a finding must be based on a due-process court hearing. *See* [Wis. Stat.](#) § 51.61(1)(g), (6); *State ex rel. Jones v. Gerhardstein*, [141 Wis. 2d 710](#), [416 N.W.2d 883](#) (1987).

Commitment under the fifth standard, [Wis. Stat.](#) § 51.20(1)(a)2.e., is an exception to this because a finding of inability to make an informed choice is incorporated into the elements necessary for commitment. *See* *Rock Cnty. v. B.A.G. (In re Mental Commitment of B.A.G.)*, No. [2018AP782](#), 2018 WL 3602221, ¶ 37 & n.3 (Wis. Ct. App. July 26, 2018) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (distinguishing *Outagamie Cnty. v. Melanie L. (In re Mental Commitment of Melanie L.)*, [2013 WI 67](#), [349 Wis. 2d 148](#), [833 N.W.2d 607](#)).

The individual's right to refuse unwanted medication and other treatment emanates from the common-law right of self-determination. Competent individuals retain a “‘significant’ liberty interest in avoiding forced medication of psychotropic drugs.” *State v. Wood*, [2010 WI 17](#), ¶ 25, [323 Wis. 2d 321](#), [780 N.W.2d 63](#). The standard for finding a person not competent to refuse medication or treatment is as follows:

[I]f because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:

- a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
- b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

[Wis. Stat.](#) § 51.61(1)(g)4.

In *Virgil D. v. Rock County (In re Mental Condition of Virgil D.)*, [189 Wis. 2d 1](#), 15, [524 N.W.2d 894](#) (1994), the Wisconsin Supreme Court pointed to the statutory distinction between a patient's mental illness and the patient's ability to exercise informed consent. The court stated that the focus of the hearing on the patient's ability to exercise informed consent should not be the quality of the patient's decision but whether the patient understands the implications of the medication or other treatment and is making an informed choice. *Id.* Under *Virgil D.*, to meet the first standard, the court must be satisfied that all the required information has been adequately explained to the individual and that, under all the circumstances, there is evidence of the individual's understanding or lack of understanding about that information—i.e., about the advantages and disadvantages of the recommended treatment and about the alternatives to the recommended treatment. In assessing the individual's understanding, the court should consider, in particular, the following: (1) whether the individual can identify the recommended medication; (2) whether the individual has previously taken it and, if so, whether the individual can describe what happened as a result; (3) whether the individual can identify the risks and benefits of the medication; and (4) whether the individual holds any patently false beliefs about the medication or treatment. *Id.*; see also *Green Cnty. v. Janeen J.C. (In re Mental Commitment of Janeen J.C.)*, No. [2011AP2603](#), 2012 WL 1947852 (Wis. Ct. App. May 31, 2012) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)); *County of Waukesha v. Laura J.M. (In re Mental Commitment of Laura J.M.)*, No. [01-1174-FT](#), 2001 WL 943168 (Wis. Ct. App. Aug. 15, 2001) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

After *Virgil D.*, the Wisconsin Legislature added a second alternative standard to [Wis. Stat.](#) § 51.61(1)(g)4. to assess whether the individual is substantially incapable of applying an understanding of the advantages and disadvantages of and alternatives to accepting the particular medication or treatment for the individual's mental illness, developmental disability, or alcoholism or drug dependence so as to make an informed choice. The supreme court interpreted this standard in *Melanie L.*, [2013 WI 67](#), [349 Wis. 2d 148](#). At issue was an involuntary medication order for a person who was living in the community under an outpatient commitment order, which was not appealed. The court focused on the meaning of the new standard's terms in the context of choice, concluding that the plain language of the statute established the person's right to choice. The *Melanie L.* court held that the circuit court's determination should not turn on the person's actual choice but should focus on the person's ability to process and apply the relevant available information before making that choice. *Id.* ¶ 78. In this case, the supreme court held that the county had not met its burden of proving the person's incompetence to refuse medication by clear and convincing evidence, and the court cautioned that “[m]edical experts must apply the standards set out in the competency statute,” and “[a]n expert's use of different language to explain his or her conclusions should be linked back to the standards in the statute.” *Id.* ¶ 97.

In distinguishing *Melanie L.*, in which the court determined that the expert's testimony misstated the substance of the statutory standard, the lead opinion in a subsequent supreme court case clarified that there are no “magic words,” as long as the expert's testimony and conclusions can be “linked back to the standards in the statute.” *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, [2020 WI 8](#), ¶ 54, [390 Wis. 2d 50](#), [937 N.W.2d 901](#) (lead opinion) (quoting *Melanie L.*, [2013 WI 67](#), ¶ 97, [349 Wis. 2d 148](#)). See also *Winnebago County v. Christopher S. (In re Mental Commitment of Christopher S.)*, [2016 WI 1](#), ¶¶ 54–56, [366 Wis. 2d 1](#), [878 N.W.2d 109](#), in which the court found there was strict adherence to statutory standards. *Cf. State v. Hardy (In re Commitment of Hardy)*, No. [2022AP1018](#), 2023 WL 3184457 (Wis. Ct. App. May 2, 2023) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (concluding that state failed to meet statutory burden). In an unpublished decision, the court of appeals upheld an involuntary medication order even though the record did not support the circuit court's oral finding that the individual met the first standard—that he was incapable of understanding the advantages or disadvantages of accepting medication or treatment and the alternatives. *Sawyer Cnty. v. P.D.F. (In re Mental Commitment of P.D.F.)*, No. [2022AP2007](#), 2023 WL 7319326 (Wis. Ct. App. Nov. 7, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)). The court of appeals reasoned that there was sufficient evidence in the record to support the circuit court's written order that the individual met the second standard, i.e., that he was incapable of applying an understanding in order to make an informed choice. *Id.* ¶¶ 15–22. *But see Outagamie Cnty. v. L.X.D.-O. (In re Mental Commitment of L.X.D.-O.)*, [2023 WI App 17](#), ¶ 28, [407 Wis. 2d 441](#), [991 N.W.2d 518](#) (holding that expert was unclear and failed to link his testimony back to statutory standards) (review denied).

Additionally, before the court can determine that an individual is incompetent to refuse medication or treatment, “it must find that the individual has received ‘the requisite explanation of the advantages and disadvantages of and alternatives’ to the particular medication in order to make an informed choice.” *Winnebago Cnty. v. P.D.G. (In re Mental Commitment of P.D.G.)*, No. [2022AP2005](#), 2023 WL 5266152, ¶ 5 (Wis. Ct. App. Aug. 16, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (citing *Melanie L.*, [2013 WI 67](#), ¶ 54, [349 Wis. 2d 148](#)). The court in *L.X.D.-O.*, [2023 WI App 17](#), [407 Wis. 2d 441](#), determined that an examination of all the evidence supported a finding that the individual had received an explanation of the medications sufficient to meet the requirements of [Wis. Stat.](#) § 51.61(1)(g)4. The court affirmed the initial order for involuntary medication even though the expert's testimony was unclear and failed to establish a specific standard for incompetency to refuse

medication. It declined to follow *Langlade County v. D.J.W. (In re Mental Commitment of D.J.W.)*, [2020 WI 41](#), [391 Wis. 2d 231](#), [942 N.W.2d 277](#), which rejected the circuit court's involuntary medication order because the evidence did not support a finding that the advantages and disadvantages of, and the alternatives to, medication had been adequately explained. Although in both *D.J.W.* and *L.X.D.-O.* no expert report had been admitted into evidence, the *L.X.D.-O.* court distinguished the result in *D.J.W.* because that case involved a recommitment, which has no statutory requirement for an expert report. The *L.X.D.-O.* court concluded that the expert's report can be considered even if not admitted into evidence in an initial commitment because it must be filed with the court pursuant to [Wis. Stat. § 51.20\(9\)\(a\)5](#). *L.X.D.-O.*, [2023 WI App 17](#), ¶¶ 34–35, [407 Wis. 2d 441](#).

Note. There are statutory provisions for administration of involuntary medication in other chapters, such as [Wis. Stat. ch. 55](#) (protective placements) and [Wis. Stat. ch. 50](#) (nursing-home placements). See, e.g., [Wis. Stat. §§ 55.14, 50.08](#).

An involuntary medication hearing can occur at or after the probable-cause hearing. If it is held before the final commitment order, the court must find probable cause to believe that (1) the person is not competent to refuse medication or treatment; (2) the medication or treatment will have therapeutic value; and (3) medication or treatment will not unreasonably impair the person's ability to prepare for or participate in the final hearing. [Wis. Stat. § 51.61\(1\)\(g\)2](#). If the hearing is held after a commitment order, the court must make only the competency determination. The standard for that determination is not probable cause; instead, the determination must be based on clear and convincing evidence, which is the general standard followed in civil commitment cases. [Wis. Stat. § 51.20\(13\)\(e\)](#); *Virgil D.*, 189 Wis. 2d at 11–12, 14.

If a medication or treatment order is required after the commitment order has been entered, it must be initiated by a motion filed by any interested party with notice to the person, the person's counsel, if any, and the county corporation counsel. See [Wis. Stat. § 51.61\(1\)\(g\)3](#). The motion and notice must be accompanied by a report, if any, setting forth the basis for the motion, including a statement by a licensed physician, who asserts that, based on an examination of the person who is the subject of the motion, the person needs medication or treatment and is not competent to refuse it. See *id.* The court must hold a due-process hearing on the matter within 10 days after the filing of the motion unless the person or one of the counsel involved requests a postponement of up to 10 additional days. See *id.*

In *Winnebago County v. C.S. (In re Mental Commitment of C.S.)*, [2020 WI 33](#), [391 Wis. 2d 35](#), [940 N.W.2d 875](#), the Wisconsin Supreme Court held that [Wis. Stat. § 51.61\(1\)\(g\)3](#) is facially unconstitutional when used to order involuntary medication in a commitment under [Wis. Stat. § 51.20\(1\)\(ar\)](#), a statute applicable only to state-prison inmates. For both inmates and non-inmates, [Wis. Stat. § 51.61\(1\)\(g\)3](#) requires a determination that the individual is incompetent to refuse medication. But while commitment of a non-inmate under [Wis. Stat. § 51.20\(1\)\(a\)](#) also requires an initial finding of dangerousness, [Wis. Stat. § 51.20\(1\)\(ar\)](#) lacks that requirement, which the supreme court deemed essential to justify involuntary medication. *C.S.*, [2020 WI 33](#), ¶¶ 5, 46, [391 Wis. 2d 35](#).

When the court makes the required findings in either a precommitment or postcommitment hearing on the competency issue, the person can be medicated or treated without consent. The court need not appoint a guardian to make the decision for the person. Instead, the treating physician makes the decision. There also is no provision in [Wis. Stat. ch. 51](#) for an appointment of a guardian ad litem in these proceedings, even though the person's competency is at issue. The person, however, does have a right to adversary counsel. [Wis. Stat. § 51.20\(5\)](#).

Note that if a person is committed under the standard in [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#), see *supra* § [8.25](#) (standards for commitment for mental illness), no special proceeding for determining competency is held. Instead, the competency issue is part of the commitment standard. [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#) Thus, every individual who is committed under this standard may be subjected to an order for involuntary medication and treatment.

[Wis. Stat. § 51.61\(1\)\(g\)3m.](#) provides that after a final commitment order for someone committed under the fifth standard ([Wis. Stat. § 51.20\(1\)\(a\)2.e.](#)), the court “shall issue an order permitting medication or treatment to be administered to the individual regardless of his or her consent.” The use of the word “shall” in this context has been held to mean that the committing court must issue an order for involuntary treatment. *B.A.G.*, 2018 WL 3602221, ¶ 37.

E. Relationship to Protective Placement [§ 8.33]

1. Differences Between Civil Commitment and Protective Placement [§ 8.34]

To sort out whether protective placement or civil commitment is appropriate, the differences between the two must be examined. First, protective placement requires that the individual have a primary need for residential care and custody; have a disability that is permanent or likely to be permanent; and, as a result of the disability, be so totally incapable of providing for the individual's own care as to create a substantial risk of serious self-harm or harm to others. [Wis. Stat.](#) § 55.08(1)(a), (c), (d). The individual must be an adult who has been adjudicated by a circuit court to be incompetent (or, if a minor, is not alleged to have a developmental disability) and on whose behalf a petition for guardianship has been submitted. [Wis. Stat.](#) § 55.08(1)(b).

Civil commitment, on the other hand, can be used whether a person is competent or incompetent. In fact, most of the time, people who are committed are legally competent. See [Wis. Stat.](#) § 51.59 (incompetency not implied). The only exception to this general rule is the standard under [Wis. Stat.](#) § 51.20(1)(a)2.e. for involuntary treatment, which requires a finding of incompetency to make treatment decisions.

Second, a protective placement is a long-term placement, which can last the person's lifetime. Civil commitment has time limits of 6 months for the first commitment and 12 months for each subsequent commitment, [Wis. Stat.](#) § 51.20(13)(g), although recommitments can continue indefinitely. Commitments for alcoholism and drug dependence are even shorter: 90 days with a possible 6-month extension. [Wis. Stat.](#) § 51.45(13)(h). Thus, the person's need for a long-term residential placement versus a short-term hospitalization or other psychiatric treatment must be considered by everyone involved when determining whether protective placement or commitment is appropriate. For a protective placement, the need for residential care and custody must be primary and surpass the need for active treatment with psychotropic medication under [Wis. Stat.](#) ch. 51. The record must establish a history of treatment that demonstrates that more than active treatment under [Wis. Stat.](#) ch. 51 is required. *Waukesha Cnty. Dep't of Health & Hum. Servs. v. M.S. (In re Guardianship & Protective Placement of M.S.)*, No. [2022AP2065](#), 2023 WL 5743040, ¶ 31 (Wis. Ct. App. Sept. 6, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (citing *K.N.K. v. Buhler (In re Guardianship of K.N.K.)*, [139 Wis. 2d 190](#), 201–02, [407 N.W.2d 281](#) (Ct. App. 1987)).

Third, according to [Wis. Stat.](#) § 55.12(2), protective placement is intended for nursing homes, centers for developmentally disabled individuals, community-based residential facilities, adult family homes, and other long-term care facilities. It cannot be used for acute psychiatric treatment facilities. [Wis. Stat.](#) § 55.12(2). Persons who are protectively placed under [Wis. Stat.](#) ch. 55 cannot be placed on locked units except by a specific order from the court. *Id.* By contrast, civil commitment is intended for acute psychiatric treatment or treatment for alcoholism or drug dependence and may place patients in mental hospitals in locked units if the initial court order designates them as the maximum level of inpatient facility. See [Wis. Stat.](#) § 51.20(13)(c)1. Persons may be ordered to be treated involuntarily, See [Wis. Stat.](#) § 51.61(1)(g), (6). Thus, the type of facility to be used and the purpose of the placement are also important factors in deciding whether to pursue a protective placement or a civil commitment.

Fourth, protective placement requires that a person have a disability that is permanent or likely to be permanent. [Wis. Stat.](#) § 55.08(1)(d). Civil commitment has no such requirement and can be used for persons with mental illness that can be treated with appropriate psychiatric intervention. Commitment can be used for persons who have a long-term mental disability and who are presently in need of acute treatment.

Protective placement does not mean that a person has no need for appropriate care and treatment. In fact, persons under protective placement are accorded the same rights as persons under civil commitment, including the right to prompt and adequate treatment and the right to education and rehabilitation services appropriate for the individual's condition or conditions. See [Wis. Stat.](#) §§ 55.23, 51.61(1)(f).

The Wisconsin Supreme Court discussed the distinctions between the purposes behind [Wis. Stat.](#) chs. 51 and 55 in *Fond du Lac County v. Helen E.F. (In re Commitment of Helen E.F.)*, [2012 WI 50](#), [340 Wis. 2d 500](#), [814 N.W.2d 179](#). In deciding that [Wis. Stat.](#) ch. 55 would provide the best means of care for an individual with a diagnosis of Alzheimer's disease, the court compared [Wis. Stat.](#) ch. 51's principal purpose of ensuring "the provision of a full range of treatment and rehabilitation services," *id.* ¶¶ 11, 20, with [Wis. Stat.](#) ch. 55's goal of providing "long-term care of individuals with incurable disorders," *id.* ¶ 13; see also *Waukesha Cnty. v. J.W.J. (In re Mental Commitment of J.W.J.)*, [2017 WI 57](#), [375 Wis. 2d 542](#), [895 N.W.2d 783](#) (affirming recommitment under [Wis. Stat.](#) ch. 51 of patient with schizophrenia and substance-use disorder and clarifying distinction between habilitation and rehabilitation). The court in *Helen E.F.* also pointed to the fact that [Wis. Stat.](#) ch. 51 does not provide for a guardian ad litem, while [Wis. Stat.](#) ch. 55 requires one. In addition, the court suggested that responding to Helen E.F.'s long-term care needs could be better accomplished with oversight of a guardian ad litem. *Helen E.F.*, [2012 WI 50](#), ¶¶ 24–27, [340 Wis. 2d 500](#).

Sometimes questions arise as to whether a commitment under [Wis. Stat. ch. 51](#) is available if an individual could receive services under a [Wis. Stat. ch. 55](#) protective placement order. Under three of the five [Wis. Stat. ch. 51](#) dangerousness standards, the probability of the specific type of resulting harm should not be considered substantial if the individual may be provided protective placement or protective services under [Wis. Stat. ch. 55](#). See [Wis. Stat. § 51.20\(1\)\(a\)2.c.–e.](#) In *Outagamie County v. X.Z.B. (In re Mental Commitment of X.Z.B.)*, No. [2020AP2058](#), 2021 WL 2551304, ¶ 36 (Wis. Ct. App. June 22, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)), the court made clear that if the individual is under a [Wis. Stat. ch. 55](#) protective placement, the county has the burden to show that the protective placement and associated services under [Wis. Stat. ch. 55](#) were not enough to reduce the probability of harm below a “substantial probability.” In an appeal of an order to involuntarily administer medication under the fifth standard, [Wis. Stat. § 51.20\(1\)\(a\)2.e.](#), the court stated that “[i]f an order is issued under [[Wis. Stat.](#)] § 55.14 and one of these methods results in the successful administration of the medication, there is no need for commitment under the fifth standard for this purpose.” *Fond du Lac Cnty. v. J.L.H. (In re Mental Commitment of J.L.H.)*, No. [2020AP2049-FT](#), 2021 WL 1113289 (Wis. Ct. App. Mar. 24, 2021) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (quoting *Dane Cnty. v. Kelly M. (In re Mental Commitment of Kelly M.)*, [2011 WI App 69](#), ¶ 29, [333 Wis. 2d 719](#), [798 N.W.2d 697](#)).

The following chart summarizes the differences between protective placement and civil commitment.

Condition or Issue	Protective Placement	Civil Commitment
Person under consideration for commitment or protective placement	Only an adjudicated incompetent person with a permanent disability	Usually a legally competent person; however, a person can be competent or incompetent, with or without a permanent disability
Type of care or treatment	Long-term residential care	Acute psychiatric treatment/inpatient or outpatient
Length of care or treatment	Long-term; can last a person’s lifetime	Time limits of 6 months for the initial commitment and 12 months for each successive recommitment, which can continue indefinitely
Types of facilities used	Nursing homes, centers for developmentally disabled individuals, community-based residential facilities, adult family homes; no locked units without a court order	Psychiatric hospitals and other facilities, the maximum level of restrictiveness determined by the court in commitment order. County department of community programs may then transfer between levels up to the maximum without further court order

For further discussion of protective placement, see [chapter 7](#), *supra*; for further discussion of the individual’s rights under protective placement and under civil commitment, see [chapter 5](#), *supra*.

2. Switching to Protective Placement from Civil Commitment [§ 8.35]

At two points in the commitment process, the court can determine that the case is inappropriate for civil commitment and can switch it to one for protective placement. First, at the probable-cause hearing, the court may determine that there is probable cause to believe the person is appropriate for guardianship and protective placement or services. [Wis. Stat. § 51.20\(7\)\(d\)](#). The court then may appoint a temporary guardian and order emergency protective placement or services. If the court orders only protective services, the person “shall” be provided care only on an outpatient basis. [Wis. Stat. § 51.20\(7\)\(d\)1](#). The case then proceeds as if it were a protective services or placement case. See *supra* [chs. 6, 7](#) (guardianship proceedings and protective services and protective placement proceedings).

Second, at the final commitment hearing the court can determine that the individual does not meet the standards for involuntary commitment but that the person is a fit subject for guardianship and protective placement or services. See [Wis. Stat. § 51.20\(13\)\(a\)2](#). Under [Wis. Stat. § 51.67](#), the court may then appoint a temporary guardian and order protective services or placement for up to 30

days. During this period, someone must file a petition for permanent guardianship or protective placement or services. If this is done, the case then proceeds under [Wis. Stat.](#) ch. 55. *See supra* [chs. 6, 7](#) (guardianship proceedings and protective services and protective placement proceedings).

Typically, admission of an individual to a state center for persons with developmental disabilities will be through a protective placement order under [Wis. Stat.](#) ch. 55. However, [Wis. Stat.](#) ch. 51 provides for the placement of a person with a developmental disability who also has either a mental illness or extremely aggressive or challenging behaviors in a state center for persons with developmental disabilities, subject to the following conditions: (1) a determination by the DHS that a licensed bed and other necessary resources are available, and (2) an agreement between the DHS and the individual's county of residence on a maximum discharge date for the person. [Wis. Stat.](#) § 51.06(3)(b).

Note. These provisions do not apply to commitments for alcoholism or drug dependence under [Wis. Stat.](#) § 51.45.

If a proceeding is changed from a civil commitment to a protective placement or protective services proceeding, the court at the probable-cause hearing can order involuntary administration of psychotropic medication as a temporary protective service (not to exceed 30 days) if it finds probable cause to believe that the allegations under [Wis. Stat.](#) § 55.14(3)(e) apply. *See* [Wis. Stat.](#) § 51.20(7)(d)1. For further discussion of the standards and procedures relating to protective service orders for psychotropic medication, see [chapter 7, supra](#). If the conversion occurs at the final hearing, psychotropic medication can be ordered as a temporary protective service if the court finds there is probable cause to believe the person is not competent to refuse the medication and the medication will have therapeutic value and will not unreasonably impair the person's ability to participate in subsequent legal proceedings. [Wis. Stat.](#) § 51.67.

When a [Wis. Stat.](#) ch. 51 proceeding is converted to a [Wis. Stat.](#) ch. 55 proceeding, the attorney who acted as adversary counsel in the [Wis. Stat.](#) ch. 51 action cannot be appointed the guardian ad litem in the [Wis. Stat.](#) ch. 55 case. *Tamara L.P. v. County of Dane (In re Guardianship & Protective Placement of Tamara L.P.)*, [177 Wis. 2d 770](#), [503 N.W.2d 333](#) (Ct. App. 1993).

F. Role of the Guardian ad Litem [§ 8.36]

Guardians ad litem are rarely used in commitment proceedings, because the person has the right to adversary counsel. [Wis. Stat.](#) § 51.20(3). The court must refer the person to the public defender, which must appoint counsel for the person without first determining whether the person is indigent. *Id.*; *see also* [Wis. Stat.](#) § 51.60. A person may also retain and pay counsel of the person's own choosing or may waive the right to defense counsel in a civil commitment proceeding if the waiver is voluntary and the person is competent to provide the person's own self-representation. *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, [162 Wis. 2d 320](#), [469 N.W.2d 836](#) (1991).

An unpublished court of appeals opinion, *Brown County v. Noreen O. (In re Mental Condition of Noreen O.)*, No. [94-1929](#), 1994 WL 697482 (Wis. Ct. App. Dec. 13, 1994) (unpublished opinion not to be cited as precedent or authority per [Wis. Stat.](#) § 809.23(3)), addressed the role of the guardian ad litem in commitment cases. In that case, an individual who was the subject of a commitment order appealed on the grounds that the circuit court had erred by appointing a guardian ad litem in addition to legal counsel. She argued that the court had no authority to appoint a guardian ad litem and that the appointment deprived her of the right to a fair trial because the guardian ad litem developed evidence suggesting that she posed a danger to society. The court of appeals agreed that the circuit court had no authority to appoint a guardian ad litem but held that the error was not prejudicial to the individual who was committed in the case.

Comment. Nothing in [Wis. Stat.](#) ch. 51 specifically precludes the appointment of a guardian ad litem. In *Noreen O.*, the court focused on the 1975 repeal of the statutory requirement that a guardian ad litem be appointed in [Wis. Stat.](#) ch. 51 proceedings. The repeal of that requirement resulted from a change in the law requiring adversary counsel in [Wis. Stat.](#) ch. 51 proceedings and arguably was not meant to preclude the appointment of a guardian ad litem in addition to adversary counsel when the person is incompetent.

If appointed in a [Wis. Stat.](#) ch. 51 case, the guardian ad litem, as a matter of good practice, should attempt to ensure that the person knows the person's legal rights and should make a report to the court as to what would be in the person's best interests. This would most likely involve a visit with the individual, a review of the records, and a discussion of the situation with relevant treatment personnel and family. The guardian ad litem should try to contact hospital staff if the person is detained and staff involved in

community treatment programs who have worked with the person in the past. As in other situations, if the guardian ad litem feels commitment is warranted, the guardian ad litem should negotiate to try to secure the best treatment program for the person. *See supra* [chs. 2, 5](#) (information on interviewing the person and on identifying significant people in the person's life, as well as on securing appropriate evaluations and treatment).

For information on payment of the guardian ad litem, see [chapter 7](#), *supra*.

V. Other Proceedings [§ 8.37]

In addition to civil commitments, there are many other court proceedings under [Wis. Stat.](#) ch. 51, such as reexaminations, reviews of transfers, and actions based on patients' rights violations. *See* [Wis. Stat.](#) §§ 51.20(16), 51.35(1)(e), 51.61(7). Although a guardian ad litem is not required under any of these statutes, the possibility of appointment may exist, especially if the person is noncommunicative or incompetent but does not have a guardian. This latter situation may arise particularly in a proceeding under [Wis. Stat.](#) § 51.61(7), which can be used to enforce the right to treatment, the right to treatment in the least restrictive environment, or any other rights listed in [Wis. Stat.](#) § 51.61. A significant number of functionally incompetent individuals live in institutions, but not all have guardians. Having a guardian ad litem appointed may be one of the few ways to initiate a patients' rights proceeding for such an individual. *See supra* [chapter 5](#) (further information on patients' rights and actions based on patients' rights violations).

Chapter 9

Probate Court

[Margaret V. Kaiser](#)

I. Scope [§ 9.1]

This chapter begins by discussing the appointment of a guardian ad litem in probate proceedings, explaining who may be appointed, when the appointment is made, and what qualifications the guardian ad litem must have. The chapter then discusses the duties of a guardian ad litem in probate, not including guardianship and protective placement, paying special attention to cases in which the guardian ad litem represents a surviving spouse who has been adjudicated incompetent. Finally, the chapter notes the statutory provisions for paying the guardian ad litem out of estate funds.¹

Note. Although the chapter sets out many actions that the guardian ad litem in probate *may* take, details as to how and when to exercise these options must be left to the attorney's judgment under the circumstances, and these will also vary with local practice.

The guardian ad litem in a probate case generally must be comfortable practicing in many areas of law. In probate, the guardian ad litem must be familiar with not only the Wisconsin Probate Code, *see generally* [Wis. Stat.](#) chs. 851–882, but also the Wisconsin Marital Property Act, *see* [Wis. Stat.](#) ch. 766, federal and state divestment regulations, federal and state fiduciary income tax laws, federal estate tax law, and accounting and evidentiary considerations. This broad familiarity is necessary because the emphasis in probate is on ensuring that the client obtains everything to which the client is entitled under the circumstances. This contrasts with other areas of practice, in which the focus is more likely to be on one particular legal event that is often coupled with long-lasting legal consequences for the client, such as custody of a child or guardianship of an incompetent individual.

Unlike guardians ad litem in other areas of the law, the guardian ad litem in probate acts alone, consulting not with social workers and other collateral sources, but with legal resources. In probate, it is more important for the guardian ad litem to have extensive knowledge of the law than extensive knowledge about the client. The guardian ad litem often must decide whether to object to the will, elect against the will, elect marital property options, or object to an accounting, as well as decide how to ensure the maximum tax advantage for the client. Beginning with the right to object to admission of the will, and ending with the right to object to the final account, the guardian ad litem must elect these rights intelligently and be aware of anything that would slight the interests of the client. Intelligent election of these rights comes only from a thorough understanding of statutory, regulatory, and case law involving will construction, objections to wills, property rights, accounting, and taxation.

The following State Bar of Wisconsin publications provide grounding in the fundamentals of some issues that the guardian ad litem can face in probate court:

1. 1 Andrew J. Adams et al., [Advising Older Clients and Their Families](#) (State Bar of Wis. 6th ed. 2024); 2 Andrew J. Adams et al., [Advising Older Clients and Their Families](#) (State Bar of Wis. 5th ed. 2023);
2. Craig W. Albee et al., [Wisconsin Attorney's Desk Reference](#) (State Bar of Wis. 13th ed. 2024);
3. Patrick V. Anderl et al., [Eckhardt's Workbook for Wisconsin Estate Planners](#) (State Bar of Wis. 7th ed. 2019 & Supp.);
4. Jennifer R. D'Amato et al., [Wisconsin Probate System: Forms and Procedures Handbook](#) (State Bar of Wis. 5th ed. 2019 & Supp.);
5. Howard S. Erlanger, [The Marital Property Classification Handbook](#) (State Bar of Wis. 5th ed. 2023); and
6. Christine Rew Barden et al., [Marital Property Law & Practice in Wisconsin](#) (State Bar of Wis. 5th ed. 2019).

In addition, the State Bar provides an annual seminar on Legal Issues of the Aging.

II. Appointment [§ 9.2]

[Wis. Stat.](#) § 879.23 requires the court to appoint a guardian ad litem for any *person interested* (as defined in [Wis. Stat.](#) § 851.21) who is a minor or an individual adjudicated incompetent *and* who:

1. Has no guardian of the estate;
2. Has a guardian of the estate, but the guardian fails to appear on behalf of the minor or incompetent person; or
3. Has a guardian of the estate, but the guardian's interest is adverse to the minor or incompetent person's interest.

[Wis. Stat.](#) § 879.23(1).

The court may also appoint a guardian ad litem to represent the interests of persons who are not yet in being or who are presently unascertainable, such as grandchildren not yet born or missing heirs. *See id.*

Under the doctrine of virtual representation, the court need not appoint a guardian ad litem for an interested person who would otherwise require a guardian ad litem if a living person, of full legal rights and capacity, is a party to the proceeding and has a substantially identical interest. [Wis. Stat.](#) § 879.23(5). The doctrine might also eliminate the need for a guardian ad litem in matters involving a trust when there is a representative under [Wis. Stat.](#) §§ 701.0302, 701.0303, or 701.0304—i.e., a holder of a general power of appointment (“powerholder”), a fiduciary, a parent (of a minor or of an unborn child), a person having a substantially identical interest with respect to the particular question or dispute, or a person appointed by the trustee—but only if the representative does not have a conflict of interest with the person represented and there is no conflict of interest among those being represented with respect to the particular question or dispute. [Wis. Stat.](#) §§ 701.0302, 701.0303, 701.0304. “If the court determines that an interest is not represented under [[Wis. Stat.](#) §§ 701.0301–.0304], or that the otherwise available representation might be inadequate,” then the court “may appoint a representative or guardian ad litem” to represent that interest. [Wis. Stat.](#) § 701.0305. In *McGuire v. McGuire*, [2003 WI App 44](#), [260 Wis. 2d 815](#), [660 N.W.2d 308](#), the Wisconsin Court of Appeals went to some lengths to sustain the circuit court's refusal to appoint a guardian ad litem for the settlor's grandchildren, in an action involving a trust, when one of the settlor's children argued a position consistent with the grandchildren's best interests. The court of appeals determined that the settlor's daughter, who sought appointment of a guardian ad litem for her children (i.e., the settlor's grandchildren), had “a substantially identical interest in” the proceeding as the grandchildren.

Note. *McGuire* was decided under former [Wis. Stat.](#) § 701.15(2) (2001–02). That statute was repealed by 2013 Wis. Act 92, which revised the Wisconsin Trust Code effective July 1, 2014. [Wis. Stat.](#) § 701.0304(1) of the revised Trust Code contains similar language for representation by a person having “a substantially identical interest.”

A guardian ad litem's representation may extend into nonjudicial proceedings arising under the Wisconsin Trust Code. [Wis. Stat. § 701.0307\(1\)](#). This may include representation for such purposes as receiving and reviewing trust-related notices and accountings. In some situations, it may include representation in connection with a nonjudicial modification of the trust instrument itself, the termination of the trust, or the appointment of trust assets to an entirely new trust (sometimes referred to as "decanting"). See [Wis. Stat. §§ 701.0411, 701.0414, 701.1301–.1327](#).

Caution. In cases of trust modification, termination, or decanting, it is important for the guardian ad litem to consider the potential for unintended tax consequences. Also, if the representation is of an individual who is receiving or may otherwise be eligible to receive means-tested public benefits (e.g., Medicaid or Supplemental Security Income (SSI)), the guardian ad litem should take care that the result does not create a divestment penalty or otherwise jeopardize the person's financial eligibility under the rules of the benefits program.

Although the court will usually appoint the guardian ad litem when it enters the order for the hearing on the probate matter, the court may appoint the guardian ad litem on the date of the hearing but before evidence is received. [Wis. Stat. § 879.23\(2\)](#). A guardian ad litem's appointment continues until proper distribution is made for the benefit of the person the guardian ad litem represents, until the person's minority or incompetency has ended, or until the person no longer has an interest in the estate or the estate is closed. [Wis. Stat. § 879.23\(3\)](#). A guardian ad litem appointed in the administration of an estate in which a testamentary trust is created has no responsibility as to the trust unless reappointed for that purpose. *Id.*

The guardian ad litem appointed by the court must be either an attorney admitted to practice in Wisconsin or a parent or child of the person to be represented. [Wis. Stat. § 879.23\(4\)\(a\)](#). A parent or child may be appointed only if the parent or child is either an attorney admitted to practice in Wisconsin or otherwise suitably qualified to perform the guardian ad litem's functions. *Id.* If a minor's interest in the estate is unlikely to exceed \$10,000 and the minor's parent is qualified and willing to serve as guardian ad litem, the court must appoint the parent to be the minor's guardian ad litem. [Wis. Stat. § 879.23\(4\)\(b\)](#). Similarly, if an individual adjudicated incompetent has an interest unlikely to exceed \$1,000, the court must appoint as guardian ad litem a parent, if qualified and willing to serve, or if none, an adult child, if qualified and willing. [Wis. Stat. § 879.23\(4\)\(c\)](#). A guardian ad litem cannot be appointed to represent more than one person in the same matter if those persons have conflicting interests. [Wis. Stat. § 879.23\(1\)](#).

III. Role and Duties [§ 9.3]

The role of the guardian ad litem in probate differs in several ways from the role of the guardian ad litem in other areas of practice. First, it often happens in probate that there is simply no client with whom a guardian ad litem can consult. For example, the guardian ad litem may represent missing heirs. Generally, such representation will require greater independence and use of discretion and judgment on the part of the guardian ad litem. Second, in contrast to other proceedings that involve persons who may be incompetent (such as proceedings for guardianship, protective services, protective placement, admissions to psychiatric units, and civil commitment), probate matters generally do not involve collateral people, such as social workers, even when the client is incompetent.

Finally, the guardian ad litem in probate has certain statutory rights under the Probate Code. These rights include the following:

1. Right to notice of a hearing, [Wis. Stat. § 856.11](#);
2. Right to notice of filing of the inventory, [Wis. Stat. § 858.03](#);
3. Right to service of a statement of claims, [Wis. Stat. § 859.29](#);
4. Right to notice of filing of the final account, as well as a copy of the final account, [Wis. Stat. § 862.11](#);
5. Right to object to the final account, [Wis. Stat. § 862.13](#); and
6. Right to appeal any adverse decision, see [Wis. Stat. § 879.27\(4\)](#); *Disch v. Betz (In re Est. of Trotalli)*, [123 Wis. 2d 340](#), [366 N.W.2d 879](#) (1985).

Comment. Electronic filing (e-filing) of probate (and other) filings in Wisconsin circuit courts is mandatory for attorneys and high-volume filing agents. See [Wis. Stat.](#) § 801.18. To participate electronically in an e-filed case, the guardian ad litem must “opt in” as an attorney of record. The standard \$35 opt-in fee is waived for guardians ad litem. See [Wis. Stat.](#) § 801.18(7)(c) cmt.—2016 (listing court-appointed counsel among those for whom fee will not be charged); Wis. Ct. Sys., *Circuit Court eFiling—Frequently Asked Questions*, <https://www.wicourts.gov/ecourts/efilecircuit/faq.htm> (updated July 29, 2024).

Although the statutes expressly provide for certain rights, the statutes are not as clear about the guardian ad litem’s duties. The court in *Gertsch v. International Equity Research (In re Estate of Katze-Miller)*, [158 Wis. 2d 559](#), [463 N.W.2d 853](#) (Ct. App. 1990), held that [Wis. Stat.](#) § 879.23(1) does not impose a duty on the guardian ad litem to trace heirs. *Gertsch* involved a will that left a bequest of about \$800,000 to the decedent’s heirs at law. The heirs faulted the guardian ad litem for not locating them sooner, but the court noted that no statutory or case law imposes an heir-finding duty “or other similar duty” on the guardian ad litem. *Id.* at 572 n.9. The court did not define what “a similar duty” might be, nor did it provide guidance as to what else a guardian ad litem need not do in a probate case.

By contrast, *Waukesha County v. Tadych*, [197 Wis. 2d 653](#), [541 N.W.2d 782](#) (Ct. App. 1995), a nonprobate case that is likely to apply to probate, offers another view. In *Tadych*, a real estate tax lien foreclosure action required appointment of a guardian ad litem to represent the interests of any known or unknown incompetent or minor claimants to the real estate involved. *Tadych* made two points arguably applicable to the probate situation. First, the guardian ad litem should be appointed early enough in the proceedings to have the opportunity to accomplish the work necessary for the job. *Id.* at 660. Second, the guardian ad litem cannot simply be a passive participant whose presence fulfills a statutory requirement. The guardian ad litem should look for any possible incompetent claimants or minor claimants. *Id.*

Practice Tip. The guardian ad litem in probate might not have specific duties that must be performed in every case. However, the situation in *Tadych* is analogous to the situation in a probate case in which there is a concern for possible unknown heirs at law. The prudent guardian ad litem in probate should therefore look to *Tadych*, rather than *Gertsch*, for guidance.

The rights and options available to the guardian ad litem at each stage of the procedure are probably clearer in probate than in other areas of guardian ad litem work. For instance, in any estate in which a will has been executed, the guardian ad litem’s first duty is to investigate the circumstances surrounding the execution of the will. [Wis. Stat.](#) §§ 853.01, 853.03, 853.04, and 853.07 set out the formal requisites for proper will execution. It will be a rare, but not impossible, case in which a will fails for lack of proper execution. If the will leaves the client less than what the client’s intestate share would be, proving a lack of proper execution could be the easiest way for the client to increase the client’s interest in the estate.

The guardian ad litem might also need to consider whether the testator had testamentary capacity or was unduly influenced. The capacity of the testator to execute a valid will is determined by the standards of [Wis. Stat.](#) § 853.01. Case law on the subject of undue influence is also well settled. See, e.g., *Johnson v. Merta (In re Est. of Dejmal)*, [95 Wis. 2d 141](#), [289 N.W.2d 813](#) (1980); *Hoelt v. Friedli (In re Est. of Friedli)*, [164 Wis. 2d 178](#), [473 N.W.2d 604](#) (Ct. App. 1991); *Miller v. Vorel (In re Est. of Vorel)*, [105 Wis. 2d 112](#), [312 N.W.2d 850](#) (Ct. App. 1981).

While the standards for assessing testamentary capacity and undue influence might not be routinely questioned in contemporary case law, the facts and circumstances to be examined in each case involving litigation on such topics are often hotly debated. With the repeal of [Wis. Stat.](#) §§ 885.16 and 885.17 (2015–16) (Wisconsin’s so-called dead-man’s statutes), the type of evidence admissible to show capacity or undue influence (or the lack thereof) has been expanded. Wis. Sup. Ct. Order 16-01, 2017 WI 13, 373 Wis. 2d xiii (eff. July 1, 2017). In particular, there is no longer a bar to testimony about communications had with a person who is now deceased, even when the testimony is offered by someone with a personal stake in the outcome of the case. Thus, debate on these issues could progress farther than previously allowed. The guardian ad litem in any such proceeding should therefore be well acquainted with the rules of discovery, motion practice, the rules governing evidentiary proceedings, and other aspects of trial practice.

Comment. Although the guardian ad litem has the right to object to admission of the will to probate, this right should be exercised only with great caution and only after a thorough factual investigation. If there is one type of proceeding that is consistently as emotional as a bitter divorce, it is a will contest. The mere fact that the decedent’s will either excludes the client entirely or reduces the client’s share to less than the client’s intestate share does not make the will objectionable. If the decedent wanted the estate to pass according to the intestacy laws, the decedent would not have executed a will.

A child born or adopted after the will was made who was thus omitted from the will, or a child who was omitted from the will by mistake or accident, may claim a share in the estate under [Wis. Stat. § 853.25\(1\)](#) or (2). Claiming such a share is an example of how the guardian ad litem can represent the client's best interests through the exercise of the client's legal rights.

Comment. Although filing a will contest might be the most likely way to make the guardian ad litem unpopular, election of the [Wis. Stat. § 853.25](#) right probably does not do much for the guardian ad litem's popularity, either. However, family opposition should not deter the guardian ad litem from doing what is in the client's best interests.

The guardian ad litem could decide to take other actions early in the probate process. For example, whenever a corporate personal representative is involved, the guardian ad litem may object to the selection of the attorney chosen to represent the estate. *See* [Wis. Stat. § 856.31](#). The guardian ad litem may also ask the court to construe a will. *See* [Wis. Stat. § 863.21](#).

The guardian ad litem has a continuing obligation to represent the best interests of the client during administration of the estate after admission of a will. [Wis. Stat. § 879.23\(3\)](#). In so doing, the guardian ad litem may, under [Wis. Stat. § 859.33](#), object to claims against the estate and must be involved in any compromises of claims under [Wis. Stat. § 859.47](#). Under [Wis. Stat. § 879.03\(2\)\(b\)](#), the guardian ad litem has the right to notice of any compromise. These rights can be very important when the client is entitled to receive a share in the residue of the estate because claims will reduce the residue available for distribution, as will attorney fees that are a result of protracted litigation. Familiarity with the claims-filing procedures in probate is crucial because an otherwise-valid claim may be barred because of late filing. *See* [Wis. Stat. § 859.02](#).

Finally, after entry of final judgment, the guardian ad litem may participate in an appeal. [Wis. Stat. § 809.19\(6m\)](#) provides direction on how the guardian ad litem should brief a case on appeal.

Note. A guardian ad litem who chooses not to participate in an appeal must file with the court an explanation of the reasons for not participating. [Wis. Stat. § 809.19\(6m\)](#).

IV. Representing the Incompetent Surviving Spouse [§ 9.4]

[Wis. Stat. § 861.09](#) authorizes the guardian ad litem to exercise a surviving spouse's rights to elect the deferred marital property elective share under [Wis. Stat. § 861.02\(1\)](#) if the surviving spouse is adjudicated incompetent. The time limit for this election is set out in [Wis. Stat. § 861.08](#). In addition, [Wis. Stat. § 861.43](#) extends authority to the guardian ad litem to apply under [Wis. Stat. § 861.35\(1m\)](#) for an allowance for the support of the spouse and for the support and education of any minor children.

The guardian ad litem must be very familiar with *Tannler v. DHSS*, [211 Wis. 2d 179](#), [564 N.W.2d 735](#) (1997). In *Tannler*, the surviving widow was institutionalized and receiving medical assistance. Her husband's will left her nothing. Neither the widow nor her guardian ad litem contested the will or made any of the elections available to her. The Wisconsin Department of Health and Social Services (now the Department of Health Services) ruled that these failures constituted divestment, potentially making the widow ineligible for medical assistance for some period of time. Citing the *Medical Assistance Handbook* (now the *Medicaid Eligibility Handbook*, published by the Department of Health Services), the Wisconsin Supreme Court agreed. *Tannler* has implications for the various marital property elections as well. The case and its implications are discussed in depth in Barbara Hughes, *Tannler Decision Interprets Action*, Elder Law News, Fall 1997, at 15.

In a similar vein, a surviving spouse who receives long-term care Medicaid benefits might face a potential "divestment-by-death" situation if the nonrecipient spouse dies and leaves restricted assets to someone other than the surviving spouse during the five-year period after initial Medicaid eligibility. *See* [Wis. Stat. § 49.455\(5\)\(d\)](#). In such cases, the surviving spouse's Medicaid benefits may be terminated for a time based on the value of the divested assets, potentially causing significant health and financial concerns for the surviving spouse.

Thus, the various elections and allowances available have serious implications that go beyond property and probate law. The law in the area of medical assistance and divestment is dynamic and should be reviewed very carefully when these issues arise.

A difficult situation for the guardian ad litem arises when a client is living in a nursing home or is likely to enter one shortly. If the client is receiving or might become eligible to receive medical assistance for nursing home care, the guardian ad litem should be aware that a failure to elect under [Wis. Stat. § 861.02](#) will invoke the statutory divestment and disqualifications provisions of [Wis.](#)

[Stat.](#) § 49.453, and the related regulations of [Wis. Admin. Code](#) § DHS 103.065, potentially disqualifying the surviving spouse from medical assistance. Although the guardian ad litem will likely run into considerable hostility from the client's family members by electing under these circumstances, the duty is owed to the client, and the guardian ad litem should act accordingly.

The guardian ad litem may invoke a few other rights on behalf of the surviving spouse. These include the following:

1. Exemption of property, [Wis. Stat.](#) § 861.41;
2. Selection of personal property, [Wis. Stat.](#) § 861.33;
3. Pursuit of transfers made in fraud of the surviving spouse, [Wis. Stat.](#) § 861.17;
4. Allowance during administration and special allowance rights also available to minors, [Wis. Stat.](#) §§ 861.31, 861.35; and
5. Disclaimer of share, [Wis. Stat.](#) § 853.40.

For tax purposes, it may be appropriate for the spouse to exercise a disclaimer under [Wis. Stat.](#) § 853.40. Be aware, however, that such a disclaimer has possible medical assistance ramifications under [Wis. Stat.](#) § 49.453 when the spouse is receiving, or may receive, medical assistance. In addition, [Wis. Stat.](#) §§ 861.31(1m) and 861.35(1m) grant the probate court the authority to impose an allowance for the support of any minor children.

Note. The U.S. Supreme Court has ruled that same-sex couples have a fundamental right to marry in all states and that all states must recognize same-sex marriages validly performed in other jurisdictions. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Thus, federal and state laws and regulations apply to married same-sex couples in the same manner as they do to married heterosexual couples. For instance, individuals in a same-sex marriage may claim the unlimited marital tax deduction for transfers during life and upon death, file joint federal and state income tax returns, enter into a marital property agreement and make use of a will-substitute agreement (also known as a Washington will, see [Wis. Stat.](#) § 766.58(3)(f)), claim an elective share in a deceased spouse's estate, and assert other rights granted by Wisconsin marital property law.

Importantly, same-sex couples who have registered as "domestic partners" may be entitled to certain spousal-like rights, see generally [Wis. Stat.](#) ch. 770 (domestic partnership), although the ability to register new domestic partnerships ended on April 1, 2018, see [Wis. Stat.](#) § 770.07(3), created by 2017 Wis. Act 59, § 2225r. Domestic partners are expressly distinguished from married persons by statute, and guardians ad litem should be aware of the distinctions. Moreover, the guardian ad litem should be aware that domestic partnership status automatically terminates when either partner enters into a marriage recognized in Wisconsin. [Wis. Stat.](#) § 770.12(4)(b).

V.

Payment of the Guardian ad Litem [§ 9.5]

Unlike the typical guardian ad litem appointment, when the appointment is in probate, estate funds may be available to pay the guardian ad litem. This procedure is governed by [Wis. Stat.](#) § 879.23(4)(d). It is important that the guardian ad litem submit a bill to the personal representative or the attorney for the estate so that it can be incorporated into the final account. Often, in larger estates, there will be options available for the deduction of the guardian ad litem fees on either the fiduciary or federal estate tax returns. The guardian ad litem should be sure that the deduction is properly taken. See *supra* [ch. 1](#).

Chapter 10

Personal Injury

[Eric J. Ryberg](#)

I. Scope of Chapter [§ 10.1]

This chapter discusses the issues confronted by a guardian ad litem appointed to represent the best interests of a minor or an incompetent person who is a party to pending or potential litigation as a result of an injury. Although the role of the guardian ad litem in such matters may involve analysis of issues far too diverse to be addressed here, the chapter offers a practical guide to the guardian ad litem by addressing those issues common to most cases and by identifying commonly overlooked considerations that may be peculiar to personal-injury matters. The chapter also addresses the role of the guardian ad litem in personal-injury actions in which a minor is concerned, but the injury itself is suffered by someone other than the minor.¹

The principal focus of the chapter is the role of the guardian ad litem when a court is being asked to approve the settlement of a claim made on behalf of a *minor*. Settlement of such claims is the most common context in which a guardian ad litem is involved in personal-injury litigation. Most of the analysis is also applicable to cases in which a personal-injury claim is made on behalf of a person whose need for the assistance of a guardian ad litem is based on mental disability.

Note. For a detailed discussion of the standard to be applied in determining incompetency under [Wis. Stat.](#) § 807.10 of the 2003–04 Wisconsin Statutes, see *Kainz v. Ingles*, [2007 WI App 118](#), ¶¶ 22–54, 300 Wis. 2d 670, [731 N.W.2d 313](#). The *Kainz* court applied a version of [Wis. Stat.](#) § 807.10 that had referred to a settlement on behalf of a “mentally incompetent person.” [Wis. Stat.](#) § 807.10 (2003–04). The court did not apply a later-amended version of the statute, which now refers to an “individual adjudicated incompetent.” [Wis. Stat.](#) § 807.10; see *Kainz*, [2007 WI App 118](#), ¶ 7 n.3, 300 Wis. 2d 670.

II. Procedural Requirements for Settlement of Claims on Behalf of Minors and Incompetent Persons [§ 10.2]

The basic procedural requirements for the binding settlement of the claims of minors are set forth in [Wis. Stat.](#) §§ 807.10 and 803.01(3). They are summarized here, and their application to matters involving the guardian ad litem will be discussed throughout the chapter.

[Wis. Stat.](#) § 803.01(3) relates to the capacity of minors or incompetent persons to be parties to litigation, and the statute details the role and duties of the guardian ad litem. [Wis. Stat.](#) § 807.10 relates to settlements made on behalf of minors. For a settlement to be binding on a minor, it must be approved by an appropriate court.

In cases in which no action has been brought on the minor’s claim, [Wis. Stat.](#) § 807.10(2) governs. If the minor has a guardian, and that guardian is represented by an attorney, [Wis. Stat.](#) § 807.10(2) allows the guardian to settle the minor’s claim with approval of the court that appointed the guardian. In the alternative, a guardian ad litem appointed under [Wis. Stat.](#) § 803.01(3)(b) can settle a minor’s claim with the approval of any court of record. [Wis. Stat.](#) § 807.10(2). It is the approval by the appropriate court that makes the settlement binding on the minor. [Wis. Stat.](#) § 807.10(2) specifically provides that an order approving such a settlement has the same force and effect as a judgment of the court.

In cases in which an action is already pending concerning the minor’s claim, [Wis. Stat.](#) § 807.10(1) governs. If the minor has a guardian, and that guardian is represented by an attorney, [Wis. Stat.](#) § 807.10(1) allows the guardian or a guardian ad litem to settle the claim with the approval of the court in which the action is pending. In most instances, such court approval will be the last action by the court on the claim, and dismissal of the action itself will follow.

III. Appointment [§ 10.3]

An attorney may receive a request to act as guardian ad litem for a minor involved in a personal-injury case from any of several sources. Most commonly, a minor injured in an accident will first come to the attention of a claims adjuster investigating the accident on behalf of a potentially liable insurer. Under [Wis. Stat.](#) § 803.01(3)(b)6., if the claims adjuster ultimately reaches a settlement agreement with a parent of an unrepresented minor and proposes to have the settlement made binding on the minor through the court-approval process, a guardian ad litem must be appointed.

Note. In various instances, the claim of a potential ward may be guided by one parent, both parents, or a guardian. For simplicity, this chapter will refer to the role of “parent,” but this reference is intended to include whichever adult or adults fill that role.

[Wis. Stat.](#) § 757.48(1)(a) requires that the guardian ad litem be an attorney admitted to practice in Wisconsin. Thus, an attorney may receive an inquiry from the parent, the adjuster, or an attorney hired by the insurer asking that the attorney serve as guardian ad litem. If the attorney agrees to serve, the party seeking the appointment will generally ask the court to appoint the attorney to act as the guardian ad litem. See [Wis. Stat.](#) § 803.01(3)(b)1.

When a parent has retained counsel for the minor before settlement negotiations, the attorney retained to represent the minor in the prosecution of the claim itself will generally be called on to present the matter to the court for approval. See [Wis. Stat.](#) § 803.01(3)(a). In many cases, that attorney will already have been appointed guardian ad litem at the commencement of the litigation brought to pursue the claim. See *id.*

Some courts will require that a separate guardian ad litem be appointed for purposes of the settlement-approval process. The appointment of a separate guardian ad litem often is based on a concern that because the fees of the attorney handling the case are subject to court approval, an attorney could recommend approval of an inappropriate fee in the attorney's own favor. Another stated reason for the requirement of a separate guardian ad litem is a concern that an attorney chosen by the parents may be inclined to recommend a settlement distribution that is unduly favorable to the parents at the expense of the minor. These concerns cannot be eliminated entirely. Even the fees of a separate guardian ad litem who is nominated by the parent or the attorney of record are subject to court approval. Moreover, when the proposed settlement is the result of lengthy and complex litigation, a newly appointed guardian ad litem may be at a distinct disadvantage in the guardian ad litem's efforts to reliably evaluate the merits of the case and the proposed settlement.

Ultimately, the choice of a guardian ad litem should not be considered a substitute for the court's need to independently judge the merits of a proposed settlement distribution. Whether appointment of a separate guardian ad litem is required may depend on the complexity of the matter and the ability of an attorney already involved to provide the court with a sufficiently detailed and understandable description of the matter to allow a fully informed and independent judgment on the merits of the proposed settlement.

Sometimes a request to serve as guardian ad litem in the settlement approval process will come directly from the court before which the matter is pending or the court to which a petition for approval of settlement has been assigned. Most often, a direct request from the court will occur when the petition has been filed without any nomination of a proposed guardian ad litem by the petitioning party. Occasionally, a court may request the advice of a particular attorney because of that attorney's experience in similar personal-injury matters or out of a specific concern about the propriety of a proposed settlement.

IV. The Role of the Guardian ad Litem [§ 10.4]

The role of the guardian ad litem in the settlement of personal-injury actions is twofold. The guardian ad litem must (1) gather all information necessary to determine what is in the ward's best interests, and (2) make a recommendation to the court based on that determination. The guardian ad litem's role in personal-injury actions is essential because when a guardian ad litem is involved in presenting or commenting on a proposed settlement in a personal-injury case, it means that several important facts are true:

1. A minor or incompetent person has been injured or has a recognizable claim because of the injury or death of another person.
2. A settlement has been offered by someone allegedly responsible for the damages.
3. By virtue of age or mental capacity, the minor or incompetent person cannot pursue or settle the claim on the person's own.
4. Someone responsible for pursuing the claims of the minor or incompetent person (sometimes a guardian ad litem who is already familiar with the case) is inclined to accept the settlement offer.

The single most important issue for the guardian ad litem to think about is that court approval of the settlement will make the settlement binding on the minor and eliminate the right of the minor to bring an action later seeking damages. Minors' parents and tortfeasors' insurers are free to enter into whatever agreements they wish. The payment of settlement funds by insurers in exchange for the execution of a release by adults will likely result in a binding contract that forecloses future claims. The contract will be binding on the minor, however, only if the court approves. [Wis. Stat.](#) § 807.10. In the absence of court approval, a minor could ignore a release entered into by a parent. Thus, the real beneficiary of court approval is the tortfeasor or insurer seeking to bind the minor to

the agreement reached with the parent. The guardian ad litem must advise the court whether the proposed settlement is sufficiently advantageous to the minor so that it should be made binding.

In *Parsons v. American Family Insurance Co.*, 2007 WI App 211, [305 Wis. 2d 630](#), [740 N.W.2d 399](#), the Wisconsin Court of Appeals ruled that a minor, on whose behalf judgment is taken and satisfied in the manner prescribed in [Wis. Stat. § 807.01](#), is bound by the outcome under the doctrine of accord and satisfaction even in the absence of court approval under [Wis. Stat. § 807.10](#).

Comment. An argument could be made that the court's distinction between the process of entry and satisfaction of judgment and the process of settlement as contemplated in [Wis. Stat. § 807.10](#) creates an avenue for circumvention of [Wis. Stat. § 807.10](#)'s approval requirement. However, the circumstances in the *Parsons* case were unique. In *Parsons*, the plaintiff became an adult shortly after the judgment was entered and chose to hold the funds for her own use for several years without taking any action to repudiate or set aside the judgment. The court of appeals deemed the plaintiff's conduct to be a ratification of the outcome and declined to rule that the failure to obtain court approval under [Wis. Stat. § 807.10](#) while the plaintiff was still a minor invalidated the outcome of her case.

The role of the guardian ad litem is an advisory one. Under [Wis. Stat. § 807.10](#), a guardian ad litem's approval of a settlement does not make it binding. Rather, it is court approval that makes the settlement binding. The court should look to the guardian ad litem for a recommendation but should not substitute the guardian ad litem's judgment for its own. An attorney appointed to act as guardian ad litem should recognize, however, that some courts will not engage in as detailed an analysis as may be necessary. This reality simply underscores the need for the guardian ad litem to take the job seriously.

To make an informed decision regarding the merits of a proposed settlement, both the guardian ad litem and the court will need reliable and detailed information. In cases in which the minor and the minor's parents have been unrepresented, the guardian ad litem should reasonably expect the insurer to obtain and provide much of the information. After all, it is the insurer who receives the benefit of court approval, and the insurer should not complain when the guardian ad litem tries to do the guardian ad litem's job by asking for the information. Indeed, if the insurer is responsible for the guardian ad litem's fees, the insurer should welcome the opportunity to do what it can in the information-gathering process, rather than face the bill for the guardian ad litem's time in obtaining the information.

If the minor has been represented by an attorney who is now recommending the proposed settlement, all the necessary information should be in the attorney's file or be readily available to the attorney. Like the insurer, this attorney should not complain when the guardian ad litem attempts to perform the guardian ad litem's duties by asking the attorney for all relevant information to which the attorney has access. If the attorney expects the guardian ad litem to recommend court acceptance of the attorney's advice to settle, the request for information is both reasonable and necessary.

The guardian ad litem should refuse to make a recommendation until the information is presented. The guardian ad litem should feel free to call on all the parties to the dispute to provide information. Accident reports, witness statements, photographs, medical records, expert witness reports, and damages projections should be provided to the guardian ad litem. Once the guardian ad litem has the necessary information, and if the guardian ad litem intends to recommend approval of the settlement, the guardian ad litem should ensure that all necessary information is attached to the petition seeking the court's approval. See [Wis. Stat. § 807.10\(1\)](#). If a court is inclined to simply rubber-stamp the guardian ad litem's recommendation, the submission of the detailed information will cause no harm and will actually help create a more substantial court record. If the court does undertake its own detailed evaluation of the settlement, the court will need every important piece of information used by the guardian ad litem.

Practice Tip. In some cases, the proposed settlement will have arisen from matters that were in litigation long before the proposed settlement was reached. The circuit court may be very familiar with the case because of motions and other pretrial proceedings. A guardian ad litem asked to review such a proposed settlement would be well served to ascertain the court's working knowledge of the case. The court may be able to direct the guardian ad litem to certain matters on which the court needs advice and steer the guardian ad litem away from areas with which the court is already thoroughly familiar.

In summary, the role of the guardian ad litem in personal-injury cases is to provide the court with a realistic analysis of the proposed settlement from the perspective of the minor's best interests. The guardian ad litem should call on any party to pending or potential litigation who has proposed a settlement to provide the guardian ad litem with any available information and evidence bearing on the settlement. If the guardian ad litem is not persuaded that the settlement is in the minor's best interests, the guardian ad litem should recommend rejecting the proposed settlement. If the guardian ad litem is persuaded that the settlement is in the minor's best interests, the same information and evidence that was considered by the guardian ad litem should be presented to the court.

V. Injury to the Minor: A Format for Evaluating Proposed Settlements [§ 10.5]

A. In General [§ 10.6]

This chapter cannot set forth all the variables that may be encountered by a guardian ad litem charged with the responsibility of evaluating whether a negotiated settlement should be made binding on the person who has suffered the injury, but whose opinion the court cannot recognize because of the person's age or infirmity. Sections [10.7–18](#), *infra*, provide a format for analyzing a proposed settlement by addressing certain questions that arise in every case. Proponents of a settlement should be willing and able to address these questions candidly with the guardian ad litem.

B. Timing [§ 10.7]

The first question that the guardian ad litem must address in evaluating a proposed settlement on behalf of an injured minor is whether the case should be settled at all at the proposed time. In some cases, the party with the greatest desire to bring an end to a case will be the party against whom the claim has been or could be brought. The more inevitable the liability, the stronger the desire to have the liability established and cleared sooner. In most instances, the driving force behind a settlement is an insurer that acknowledges that it will ultimately be held responsible for paying damages and that wishes to fix the amount of those damages. The desire may be motivated by simple business and accounting techniques that do not favor uncertain future liabilities or by a sophisticated analysis suggesting that the risk of the liability becoming significantly greater with time outweighs the value of holding the money in the meantime. Either way, fixing the amount and ending the claim are desirable.

In other cases, the push for resolution may come from those responsible for the minor. The most common events causing injury are motor vehicle accidents. Those accidents can occur while children are riding with their parents, who then may have to deal with personal guilt (and legal liability) for the injury itself. In such circumstances, parents may be motivated by a need for closure. Parents may also face medical bills for treatment rendered to the minor and thus may have an overwhelming need to resolve their own claims. A parent's emotional or financial need for resolution and closure may influence the parent's perception of the child's "best interests." It would be unrealistic for the guardian ad litem to ignore the effect of pending claims or upcoming legal developments in liability claims involving multiple family members. The guardian ad litem must attempt to recognize the presence of such family issues, which may be very real but should not be allowed to determine the timing of the resolution of the minor's claims.

The law protects children. With some notable exceptions, any time before an individual's 20th birthday, that individual can bring a personal-injury action for an underlying claim that accrued when the individual was a minor. [Wis. Stat. § 893.16\(1\)](#).

Note. One exception, for example, is found in [Wis. Stat. § 893.55](#) and [Wis. Stat. § 893.56](#), which provide that most claims arising from injuries to children as a result of medical malpractice must be brought within 3 years after the date of injury or before the child's 10th birthday, whichever is later. Disabilities other than minority, such as mental illness, may also influence the applicability of the statutes of limitation. See [Wis. Stat. § 893.16](#).

The decision as to when a child's personal-injury claim should be settled often turns on a balance of competing concerns. Generally, liability is most easily proved when the evidence can be presented soon after the event because witnesses are available and certain about their recall. In contrast, damages are most easily proved by waiting long enough to develop evidence of the difficulties that the injury is likely to cause.

Thus, when identifying the best time to settle a case, the guardian ad litem must consider the simplicity or complexity of the liability issues, the age of the child, and the likelihood that future damages will become more evident with the passage of time. If, for example, a three-year-old suffers a closed-head injury, nothing short of an assurance by appropriate physicians of full recovery should form the basis for settlement analysis. If a treating physician acknowledges that it would be useful to see how the child performs on standardized testing in first or second grade, settlement should await that testing.

Naturally, a guardian ad litem asked to evaluate the appropriateness of a settlement must consider the procedural posture of the case. If a case is set for trial in one month, waiting two or three years for the damages evidence to ripen might not be an available option. On the other hand, an obviously liable insurer seeking approval of the settlement of the minor's claim before the extent of healing can accurately be assessed should not be allowed to force a premature resolution of the case.

Ultimately, the court has authority to decline a proposed settlement if it is best to wait until the extent of the injury is clear. [Wis. Stat. § 805.04\(2\)](#), for example, authorizes the court to dismiss an action without prejudice when the court deems it proper. A guardian ad litem who suggests such a dismissal might not make friends of the proponents of a settlement but may take satisfaction in having properly and fully executed the guardian ad litem's obligations.

C. The Claim [§ 10.8]

1. In General [§ 10.9]

Settlements generally are voluntary agreements entered into by adversaries seeking to avoid the uncertainties of trial. The adequacy of a particular settlement cannot be analyzed without considering the available alternative—trial. Thus, the process of analyzing the proposed settlement should include an evaluation of the minor's prospects for successful prosecution of the claim at trial. Frequently, proponents will advise entering into a settlement because it avoids the need for trial. Although it is true that trial involves uncertainty and may be an unpleasant process, the extent to which a minor's claim is discounted to avoid a trial should reflect the actual risk faced in the individual case rather than a general desire to avoid trials in all cases.

Three main variables are usually involved in analyzing whether a proposed personal-injury settlement is advisable: (1) the likelihood of establishing a party's liability for the minor's injuries, (2) the amount of damages likely to be awarded if liability is successfully established, and (3) the prospects for collecting the damages awarded. Each variable will be discussed generally below, although complete coverage of the issues would require separate treatises on tort law, damages claims, and insurance law. *See, e.g., The Law of Damages in Wisconsin* (Russell M. Ware ed., State Bar of Wis. 9th ed. 2023 & Supp.); Brian D. Anderson et al., *Anderson on Wisconsin Insurance Law* (State Bar of Wis. 9th ed. 2023 & Supp.) [hereinafter [Anderson on Wisconsin Insurance Law](#)].

A guardian ad litem who has been asked to make a recommendation as to whether the court should approve a settlement must analyze the same issues that were already analyzed (presumably) by the parties who negotiated the settlement. Generally, the party offering the settlement is the liability insurer with vast experience in similar matters. The likelihood that a settlement offer is disproportionately unfavorable to such an insurer is small. The guardian ad litem's principal concern in evaluating the settlement offer is making certain that the proposed settlement is not so favorable to the insurer that it is disproportionately unfavorable to the minor.

The guardian ad litem should take particular care if an unrepresented parent negotiated the proposed settlement. In such cases, the guardian ad litem is likely to be the first attorney analyzing the case from the minor's perspective. Even the most well-intentioned parent is unlikely to know all the elements necessary to prevail on a claim or all the damages the minor could recover as a result of the injury.

Unless the guardian ad litem has or develops a good working knowledge of the case and the applicable law, the guardian ad litem cannot properly analyze the case. If the settlement has been negotiated by an attorney representing the minor, that attorney should have already made the necessary analysis and should have the documentation and information on which the analysis was based. Similarly, the guardian ad litem can be assured that the party offering the settlement has made the same analysis. Thus, complete information should be fairly easily available to the guardian ad litem.

2. Liability [§ 10.10]

In evaluating a proposed settlement on behalf of an injured minor, the minor's guardian ad litem must determine the minor's chances of prevailing at trial. At the outset, then, the guardian ad litem must explore the legal and factual bases of the minor's claim. The legal basis for a minor's claim can take many forms, but in most instances, a tort claim is involved. In such cases, it is necessary to understand the event that caused the injury. Another person's liability for the minor's injury may be obvious, as in certain motor vehicle collisions in which the negligence of one driver is clear and is the overwhelming or exclusive cause of the injury. In other situations, the person's liability may be more subtle, such as in products-liability cases or cases in which a minor was exposed to dangerous conditions and the responsibility for safeguarding against such exposure is highly disputed.

In all cases, the guardian ad litem should develop an understanding of what must be proved for the minor to prevail. The Wisconsin Civil Jury Instructions are a good source for the legal prerequisites of a claim. The jury instructions are intended to assist the court in communicating to jurors exactly what the claimant must prove to prevail. The same instructions can be useful to a

guardian ad litem analyzing a case involving liability issues that the guardian ad litem does not encounter with regularity. Even the most experienced personal-injury attorney will frequently refer to the standard jury instructions to assess the chances of success in a case. One doctrine frequently overlooked in assessing the likelihood of a minor's success in a tort action, for example, is described in [Wis. JI—Civil 1010](#), which establishes that a minor's conduct must be judged in light of the minor's age. Thus, conduct that would be deemed obviously negligent on the part of an adult may be considered ordinary care on the part of a child.

The statutes, which answer some questions plainly, are another readily available source of information. For example, [Wis. Stat. § 895.045](#) describes the practical impact of potential comparative negligence findings. [Wis. Stat. § 891.44](#) establishes that, if the minor is younger than seven years old, no issue as to the minor's contributory negligence can even be raised. [Wis. Stat. § 347.48](#) assigns responsibility for safeguarding children of various ages by the use of seat belts and child-safety restraints in automobiles.

Only when the guardian ad litem has a working knowledge of the liability aspects of the case can the case's damages aspect be analyzed.

3. Damages [§ 10.11]

In evaluating a proposed settlement on behalf of an injured minor, the minor's guardian ad litem must identify the damages that a court would probably award if the minor were to prevail at trial. For a complete discussion of damages in Wisconsin, see [The Law of Damages in Wisconsin](#), *supra* § 10.9.

In most instances, the proposed settlement will be described as a lump sum. There likely will be a proposed breakdown of the distribution of the settlement proceeds but no breakdown or itemization of amounts attributed to various elements of the damages claim. The guardian ad litem will nonetheless find it useful to analyze each potential damages element in assessing the proposed settlement amount. Generally, the Wisconsin Civil Jury Instructions provide guidance as to the elements of damages available on a successful personal-injury claim. The guardian ad litem may also wish to have the proponents of the settlement explain their thoughts on the elements of the damages case and the range of amounts that they consider reasonable with respect to each element.

The guardian ad litem must exercise care in identifying the proper owner of each damages claim. Generally, medical expenses incurred for treatment of minors are the parents' responsibility, and, therefore, the parents own the claim for such expenses. A claim for future medical expenses likely to be incurred after age 18, however, is owned by the minor. Health insurers, auto insurers, or governmental programs may also own subrogation claims for medical expenses paid before the settlement.

The guardian ad litem should also take care to properly apply concerns about liability issues to various damages elements. In other words, with respect to each damages element, the guardian ad litem must determine with whom liability lies. For example, a parent may be the owner of certain damages claims but may also be a potential tortfeasor whose causal negligence is an issue in the damages claims owned by the parent but not in those owned by the minor.

Thus, a guardian ad litem's analysis of a potential settlement should include (1) identification of each available damages claim owned by the minor; (2) determination of the range of reasonably likely outcomes for each; and (3) careful analysis of how each damages element is affected by the liability aspects of the case. The proponents of the settlement should have already engaged in this process and should share their opinions with the guardian ad litem.

Practice Tip. To become familiar with how these types of damages cases are handled, the guardian ad litem may contact lawyers who frequently handle personal-injury matters for minors. A guardian ad litem who is not personally experienced in such matters should feel free to ask experienced attorneys to share their thoughts on damages issues. The guardian ad litem will likely find that experienced personal-injury attorneys are quite willing to engage in such informal discussions. Experts in the field take their work very seriously and will generally be willing to take a few moments to share their thoughts in the interest of promoting the best interests of a minor and the integrity of the legal system's handling of minors' claims.

4. Collectibility [§ 10.12]

In evaluating a proposed settlement on an injured minor's behalf, the minor's guardian ad litem must consider whether, even if the minor were to prevail at trial and be awarded damages, the damages would be collectible. A successful personal-injury claim results in a judgment in favor of the injured party and against a tortfeasor. Many tortfeasors, however, cause damages that they are incapable

of paying. The likelihood of actually collecting damages awarded is a factor that cannot be ignored in evaluating a proposed settlement.

Again, the guardian ad litem should be able to rely on the proponents of the settlement to answer questions. Concerns about collection may not exist, either because the tortfeasor is able to pay any likely award or because insurance coverage is sufficient. If, however, such concerns are raised, the guardian ad litem should consider them carefully.

Most often, the extent to which a claim is collectible is dictated by the extent of the tortfeasor's liability insurance. Other forms of insurance, however, should not be overlooked. A minor may be covered by uninsured motorist coverage, underinsured motorist coverage, or medical-expense coverage purchased by the minor's parents or by the vehicle owners. Similarly, available health-care coverage should be used when possible.

If the parties consider the limitations on coverage to be a factor in a proposed settlement, the extent to which subrogation claims are being honored must be examined closely because the law does not favor the payment of subrogated claims when the victim has not been made whole. The law of subrogation changes quickly and frequently. For a complete discussion of insurance issues in Wisconsin, see *Anderson on Wisconsin Insurance Law*, *supra* § [10.9](#).

Sometimes, the proponents of a settlement will too easily dismiss the prospects of collecting damages from an individual tortfeasor in excess of available insurance coverage because the tortfeasor may be considered a likely prospect for bankruptcy in the event of an excess judgment. However, certain liabilities to tort victims cannot be discharged in bankruptcy. See 11 [U.S.C.](#) § 523. Nondischargeable debts include debts for willful and malicious injury by the debtor and debts for death or personal injury caused by the debtor's unlawful operation of a motor vehicle, vessel, or aircraft while intoxicated. 11 [U.S.C.](#) § 523(a)(6), (9).

A guardian ad litem confronted with an argument that the minor's claim is adversely affected by the limited available insurance coverage should feel free to ask for more information. If a tortfeasor is described as judgment proof (lacking assets or income with which to pay the judgment), the guardian ad litem should ask for tax returns and financial statements. The guardian ad litem should view skeptically any reluctance to provide such information. The proponents of a settlement should cooperate in providing the guardian ad litem with all information necessary to assess collectibility.

D. Proposed Distribution of Settlement Proceeds [§ 10.13]

An injury suffered by a minor may give rise to claims owned by the minor, the minor's parents, and subrogated entities responsible by contract to pay some of the losses. Frequently, the control of the claim or action rests with a parent or parents and representatives retained by them. The guardian ad litem must examine whether the proposed distribution of the settlement proceeds is based on a realistic evaluation of the respective claims.

The insurer proposing the settlement does not often care how the funds are distributed, and parents will often mistakenly anticipate that a disproportionate amount of the net available settlement proceeds will be available to them. For example, parents will frequently expect compensation in full for their losses without considering their own contributory negligence or their own responsibility for a proportionate share of the attorney fees incurred in obtaining the settlement. Similarly, parents will often overlook that the subrogated claims of health insurers, based on payment of past medical expenses, are often subrogated to the claims of the parents, not those of the minor.

A parent's ownership of a claim for a minor's future medical expenses is limited to medical expenses likely to be incurred before the minor turns 18. A claim for future medical expenses likely to be incurred after the minor turns 18 belongs to the child. Realistically, in cases involving only modest injuries, courts and juries are more conservative in awarding damages to parents for loss of society and companionship, and for provision of nursing services, than most parents anticipate. It may be up to the guardian ad litem to explain this to the parents. The greater the extent to which the settlement proceeds are intended to compensate the child for long-term consequences of an injury, the more important the role of the guardian ad litem. The guardian ad litem may be the only person speaking for the child's long-term interests.

Fortunately, most parents truly have their child's best interests at heart. When approached gently, but realistically, most parents will recognize the wisdom of a proper allocation of settlement proceeds. If a parent expresses a belief that the parent should receive a certain amount, the guardian ad litem may need to explain that receipt of a particular net amount requires an award of a larger gross amount because contributory negligence, coverage limits, and attorney fees will be deducted from the award. If, for example, the

evaluation of a child's claim assumes a 20% risk for contributory negligence and a one-third contingent fee, the parent's claim should reflect those same reductions.

Generally, the net distribution of settlement proceeds among claimants should be proportional to their gross damages claims. When a parent is contributorily negligent, however, the net proportion of settlement proceeds should be more favorable to the minor.

E. Settlement Formats and the Handling of a Minor's Settlement Proceeds [§ 10.14]

1. In General [§ 10.15]

Once a settlement has been reached and the proceeds apportioned among claimants, the court and the guardian ad litem must consider whether the minor's portion will be handled appropriately. In some ways, a minor who has received settlement proceeds is no different than any other person with assets. Family members, investment advisers, and entrepreneurs will all have their own ideas about how the minor's assets should be used or invested. Many of these ideas will be far from the minor's best interests. In response to these concerns, the Wisconsin Legislature enacted a statutory scheme for court approval of the settlement of a minor's claim to protect the minor's interests. To varying degrees, a minor may need protection from (1) tortfeasors and their insurers, who may encourage deferral of payments of settlement funds; (2) the minor's parents or guardians; and (3) attorneys given control of the cause of action. In addition, the minor may need self-protection because the minor might overestimate the minor's own ability to make sensible decisions concerning investment and spending of settlement funds. Some considerations are universal to all cases.

When a personal injury makes future medical care likely, the guardian ad litem should ensure that provision has been made for payment of future medical expenses. The timing of the medical care will determine whether the claim for its cost is part of the claim of the minor or of the parent. *See supra* § 10.13 (ownership of claims for medical expenses). The timing of the treatment also determines the need for liquidity in the handling of the settlement proceeds. In other words, if the treatment is going to be sooner rather than later, the settlement proceeds should be available relatively early to cover the costs of treatment. However, if the treatment is going to be later, it may be a good idea to invest the settlement proceeds in such a way as to make them unavailable until later.

Generally, children will express a desire to control their own assets sooner rather than later. Similarly, parents will seek to control their children's assets. For the most part, such desires are properly motivated, but the guardian ad litem's ability to distinguish well-intentioned and capable minors and parents from the less capable or inappropriately motivated children and parents will be limited. As noted in section 10.16, *infra*, the statutes identify varying levels of settlement proceeds that trigger protective steps intended to safeguard the child. Even operating within these statutory guidelines, however, a guardian ad litem must make judgments and recommendations specific to the facts of the case, the amounts of money involved, and the parties' competing desires.

2. Statutory Considerations [§ 10.16]

The statutes set out various safeguards for children whose claims are being settled. For example, when a minor with no guardian receives less than \$50,000 (not including interest, costs, and disbursements), *see* [Wis. Stat. § 867.03\(1g\)](#), [Wis. Stat. § 807.10\(3\)](#) allows the court to approve the settlement and enter an order for the distribution of proceeds (including attorney fees, guardian ad litem fees, and expenses of the action). Similarly, when a minor is entitled to settlement proceeds of up to \$50,000, [Wis. Stat. § 54.12\(1\)](#) allows the court to approve (1) the deposit of the amount in an interest-bearing account in a government-insured financial institution; (2) the investment of the amount in interest-bearing U.S. obligations (e.g., bonds); or (3) the payment of the amount to the minor's parent, the minor, a person having custody of the minor, or the trustee of any trust created for the minor's benefit. Receipt of proceeds in excess of \$50,000 will require the establishment of a guardianship of the minor's estate pursuant to [Wis. Stat. § 54.10](#).

This statutory arrangement is well intentioned. Generally, when small amounts of money are involved, less formality is necessary. On the other hand, with large amounts of money, the court's involvement in ensuring the ongoing safety of the minor's funds is justified. The arrangement, however, has significant, frequently encountered limitations. For example, personal-injury cases often result in a net compensation that is greater than \$50,000, but the compensation nevertheless might not be sufficient to make it economical to obtain professional handling of the guardianship reporting requirements of [Wis. Stat. ch. 54](#), the tax returns of the guardianship, or the management of the funds themselves. Similarly, financial institutions may be reluctant to undertake the role of guardian of a minor's estate unless the estate is substantial.

In most cases, to protect the interests of the minor, a court may require the guardian of the estate of a minor to be bonded. [Wis. Stat. § 54.46\(4\)\(a\)](#). Parents of average means will have difficulty obtaining bonding as guardians of the minor's estate. Although [Wis. Stat. § 54.46\(4\)\(b\)](#) grants a court the discretion to waive a bonding requirement, or to allow placement of \$100,000 or less in a restricted bank account without bonding, in practice, the court will likely err on the side of taking steps to protect the child's funds. Thus, a parent may encounter difficulty persuading the guardian ad litem and the court that the parent has enough experience managing money to act as a guardian. The guardian ad litem and the court will be reluctant to have even well-intentioned parents manage their child's funds if they lack investing experience. In the absence of proof of financial security, the court will also be reluctant to place the unbonded parents in a role that might tempt them to misuse the child's funds.

When a personal-injury settlement or award does result in an estate large enough to interest a financial institution in acting as guardian, different challenges arise. [Wis. Stat. ch. 54](#)'s structure for guardianship of the estate is reasonably secure and appropriate, but such a guardianship will likely expire when the minor reaches the age of majority. A minor who receives a substantial settlement may have little doubt in the minor's own ability to manage the funds once the minor turns 18. Depending on the amount involved, however, the guardian ad litem may have considerable doubts.

3. Alternatives to Consider [§ 10.17]

Caution. It is not possible to cover all legal and tax issues related to structured settlements and trusts in this chapter. The guardian ad litem needs to recognize the existence of the alternatives and evaluate them as options on a case-by-case basis.

To avoid the concerns noted in section [10.16](#), *supra*, the guardian ad litem may consider alternatives to the traditional guardianship. The most commonly used alternative is referred to as a structured settlement, whereby a portion of the settlement is paid in the form of an annuity providing future payments. Because the funds do not become part of the minor's estate until received, the \$50,000 threshold requirement for guardianship can be delayed or, if the payments do not reach \$50,000 before the minor reaches the age of majority, avoided entirely. If a structured settlement is properly arranged, its proceeds are not taxed, including the portions of the proceeds that constitute interest. In economic times when interest rates are high, this can make structured settlements attractive as an investment. In times when interest rates are low, that advantage is diminished. Income generated from the investment of the settlement proceeds may not compare well with income from alternative investment options, because the interest rate is fixed on the date the funds are invested. Further, once structured, the payment schedule is fixed. Obvious issues also exist concerning the security of the insurer issuing the annuity and the discount rate used in calculating the present value of the annuity.

Structured settlements do allow the parents, the court, and the guardian ad litem to establish a schedule of payments extending beyond the age at which the traditional guardianship would terminate. The guardian ad litem will need to consider whether extension of payments into adulthood is appropriate under the specific circumstances of the case.

Businesses offering to buy an individual's right to annuity payments for a steeply discounted cash payment have appeared and have advertised extensively, suggesting to unsophisticated plaintiffs and their families that they have a right to receive "their money" sooner than their payment schedule would otherwise allow. In an effort to discourage such profiteering, federal law imposes a 40% excise tax on such transactions. [I.R.C. § 5891](#). The federal excise tax is not imposed if the transaction in question was approved by a court or a relevant administrative body.

In response to such court approval being pursued in proceedings orchestrated by the businesses seeking to purchase the rights to structured settlement payments, many states have passed laws establishing standards for such approval. Wisconsin, for example, has established mandatory notice and disclosure requirements and set standards for judicial review of transfers of structured settlement payments. See [Wis. Stat. §§ 895.65–.70](#) (structured settlement transfers). Wisconsin's statutes are intended to discourage unsophisticated individuals from making poor choices with regard to their structured settlement payments.

Another alternative is the establishment of a trust that allows the distribution of the proceeds to be spread out over time in a manner similar to that of a structured settlement. A trust is more flexible than a structured settlement in that it may provide that money must be available for particular purposes on an as-needed basis, such as health care or post-high school education. In terms of investment potential, trusts are also more flexible than structured settlements. The flexibility can be an advantage or a disadvantage, depending on the performance of the chosen investment vehicle. Trusts, however, carry some of the disadvantages of guardianships in that tax returns will likely be required, and financial institutions will be reluctant to act as trustees over modest amounts. Parents are no more likely to be qualified to manage the funds themselves as trustees than they would be as guardians.

The guardian ad litem should consider these alternatives as early as possible in the settlement process. If a cash payment has been accepted, a belatedly established structured settlement may not accomplish the tax-free status desired. Moreover, once a settlement has been reached on a lump sum, the court might not consider itself authorized to order the funds placed in a trust or structure that would delay payments to the minor longer than a traditional guardianship would delay them. [Wis. Stat.](#) § 807.10 authorizes a court to approve or decline a proposed settlement. If the proposed settlement calls for structured payments or payment to an existing trust, there is little doubt that the court has the authority to approve it. Whether the court has authority to approve a cash settlement, and then order it placed in trust or used to purchase an annuity, is far less certain.

4. Miscellaneous Pitfalls to Avoid [§ 10.18]

The younger the minor involved, the more difficult it will be to predict the minor's needs. Thus, settlements lacking flexibility can be disadvantageous. If most of the funds are tied up in guardianships, trusts, or annuities, the guardian ad litem should take care to ensure that a source of funds remains available to meet the minor's needs. Inflexibility can also deprive the minor of alternative sources of assistance. For example, a monthly payment from a structured settlement annuity as a supplement to income may initially seem to be a sound idea. However, if monthly payment renders the recipient ineligible for certain governmental assistance, such as Supplemental Security Income or Medicaid, the receipt of the settlement funds can actually be detrimental. *See supra* [ch. 5](#). Some settlements pay the injured party a modest monthly amount that is too little to meet that individual's needs, but just enough to make the injured party ineligible for other forms of assistance. Such settlements are generally not in the best interests of the injured party.

VI. Injury to Persons Other Than the Minor [§ 10.19]

A. Wrongful Death Cases [§ 10.20]

1. Statutory Framework [§ 10.21]

Wrongful death cases in Wisconsin are governed by [Wis. Stat.](#) §§ 895.03 and 895.04. A wrongful death action is a distinct cause of action for the benefit of certain classes of surviving relatives who are enabled, by statute, to recover their own damages caused by the wrongful death. *Miller v. Luther*, [170 Wis. 2d 429](#), 435, [489 N.W.2d 651](#) (Ct. App. 1992). Because the cause of action is created by statute and not by common law, a person's right to recover depends entirely on the statute and its construction. *See Cogger v. Trudell*, [35 Wis. 2d 350](#), 360, [151 N.W.2d 146](#) (1967).

In *Force v. American Family Mutual Insurance Co.*, [2014 WI 82](#), [356 Wis. 2d 582](#), [850 N.W.2d 866](#), the Wisconsin Supreme Court recognized the need to avoid absurd results that are clearly at odds with the legislative purpose when interpreting the wrongful death statute. The court ruled that, in an admittedly unique circumstance in which the deceased and his spouse had been so estranged that she literally had no damages whatsoever as a result of his death, the deceased's children could present claims for damages.

Application of the wrongful death statute to a particular case involving one or more children will not always match a right to recover damages with the person suffering the most damages as a result of the wrongful death. A guardian ad litem acting on behalf of a minor must develop a working knowledge of the statute's framework and must recognize the limited remedies available within that framework.

The first step in the application of the wrongful death statute to a particular case involving a guardian ad litem is to identify the appropriate plaintiff under [Wis. Stat.](#) § 895.04. Identification of the appropriate plaintiff depends on whether the deceased left a surviving spouse or domestic partner but no surviving minor children, a surviving spouse or domestic partner and surviving minor children, or surviving minor children but no surviving spouse or domestic partner. *See* [Wis. Stat.](#) ch. 770 (domestic partnership). Each of these possible scenarios is addressed by [Wis. Stat.](#) § 895.04(2).

2. Minor Is a Plaintiff [§ 10.22]

When a deceased person leaves no surviving spouse or domestic partner, but does leave one or more minor children, those children are the owners of the wrongful death claim and their losses are the subject of the damages analysis. *See* [Wis. Stat.](#) § 895.04(2). The children are entitled to make a claim for pecuniary injury and loss of society and companionship. [Wis. Stat.](#) § 895.04(4). There is no

statutory limit on the amount of pecuniary injury that can be claimed, although loss of society and companionship damages are subject to statutory caps of \$500,000 in the case of a deceased minor and \$350,000 in the case of a deceased adult. The same caps apply to causes of action for such damages when brought by minor siblings of the deceased person. *Id.*

In wrongful death cases involving a minor plaintiff, the role of the guardian ad litem in evaluating a proposed settlement on behalf of the minor does not differ substantially from the role of the guardian ad litem in other personal-injury cases. It is the minor's case, and the settlement proceeds belong to the child. Although the damages claimed are peculiar to wrongful death actions, all the considerations previously discussed in this chapter are likely to apply. Matters can certainly be complicated if more than one child survives and the children have varying needs or different surviving parents who do not agree on a distribution, but these issues must be addressed just as though the children were separate personal-injury claimants seeking compensation from a limited pool of funds. For a detailed assessment of what damages can be claimed, see [The Law of Damages in Wisconsin](#), *supra* § 10.9.

3. Minor Is Not a Plaintiff [§ 10.23]

If the deceased person leaves a surviving spouse (or surviving domestic partner) and minor children, the wrongful death claim is owned by the spouse (or domestic partner) and the spouse's (or domestic partner's) damages form the basis for the damages claim. See [Wis. Stat.](#) § 895.04(2); see [Wis. Stat.](#) ch. 770 (domestic partnership). A court of record may nevertheless "set aside for the protection of such children" up to 50% of the net amount of the claim (after deducting the cost of collection) and may impress an "appropriate lien" on that amount. [Wis. Stat.](#) § 895.04(2).

If the minor's interest in the wrongful death action is limited to potential receipt of a lien against up to 50% of the net proceeds of the claim, additional considerations exist. The merits of the case itself must be evaluated to determine the amount of available funds. The child's needs must also be examined. Only then can a determination be made as to how much, if any, of the claim proceeds must actually be set aside to protect the child.

When the surviving spouse of the deceased person is also the surviving parent of the child, that spouse or parent will likely share the guardian ad litem's concern for the best interests of the child, and the guardian ad litem can expect the parent's full cooperation. The statute does not require that any of the claim proceeds be set aside. When the claimant is both surviving spouse and parent, the claimant will have the responsibility for the child's ongoing needs and there may be no need to segregate specific funds for the minor's protection.

If the deceased person leaves a surviving spouse, but that spouse is not the parent of the child in question, the surviving spouse may have little or no concern for the well-being of the child. Moreover, the child's surviving parent may be the ex-spouse of the deceased person. In such cases, the surviving spouse who owns the claim and whose damages are the basis of the claim may resent any effort to set aside funds. That surviving spouse might have children who are not the children of the deceased person. If the deceased person leaves minor children from more than one marital or nonmarital relationship, ownership of the claim may be shared by minors who have varying damages, varying financial needs, and surviving parents with varying loyalties and agendas. The underlying relationships can be quite troublesome, and the guardian ad litem must carefully evaluate the motivations of each proponent of a proposed settlement.

Note. Nonmarital and "posthumously born" children have the same rights as marital children born before the death giving rise to the action, if paternity has been properly established. *Le Fevre v. Schrieber*, [167 Wis. 2d 733](#), 739, [482 N.W.2d 904](#) (1992).

Perhaps more than in any other instance in which a guardian ad litem appears for children in personal-injury matters, it is essential that the guardian ad litem in a wrongful death case identify and pursue the specific rights of the child. These cases can also pose the greatest challenge to the guardian ad litem's ability to deal with the emotions and demands of everyone concerned.

[Wis. Stat.](#) § 895.04(2) does attempt to give the court, and thus the guardian ad litem, some guidance in setting aside funds for a child. The statute identifies the purpose of its framework for setting aside funds as being "in recognition of the duty and responsibility of a parent to support minor children." [Wis. Stat.](#) § 895.04(2) also directs the court to consider "the age of such children, the amount involved, the capacity and integrity of the surviving spouse or surviving domestic partner, and any other facts or information it may have or receive."

In light of the broad language of the statutory directives, the guardian ad litem should feel free to base an argument in favor of setting aside funds on whatever information or evidence is available concerning the child's needs and the child's reasonable expectations had the death not occurred. When the surviving spouse or domestic partner is not expected to share the guardian ad litem's concern for the child, the spouse or domestic partner will likely present evidence of that individual's own needs and expectations of support. The statute does not prohibit any party from presenting information to the court and does not prioritize claims, except that the amount set aside for the minors cannot exceed 50% of the net amount received after deduction of the cost of collection.

In essence, the statute calls for an equitable analysis based on the few enumerated factors and whatever other information is presented to the court. The guardian ad litem should anticipate that the court will rely heavily on the guardian ad litem's assessment concerning the need for specific segregation of funds for the minor.

B. Injury to Minor's Parent [§ 10.24]

A minor child of an injured person is entitled to compensation for the loss of the parent's aid, comfort, society, and companionship from those responsible for the parent's injury. *Theama v. City of Kenosha*, [117 Wis. 2d 508](#), 527–28, [344 N.W.2d 513](#) (1984). For a description of the factors to be considered in assessing the existence and the extent of such a damages claim, see [Wis. JI—Civil 1838](#) (Injury to Parent: Minor Child's Loss of Society and Companionship).

Because of the potential for such claims, a guardian ad litem may be asked to appear for a child whose potential derivative claim arising from an injury to the child's parent is being settled. This issue does not often arise except in cases of very serious injury to the parent. In cases of less serious injury to the parent, the interference with the child's right to the parent's aid, comfort, society, and companionship will be limited, and the amount of compensation the tortfeasor owes for that interference may not justify court proceedings under [Wis. Stat.](#) § 807.10 (settlements in behalf of minors).

If the parent was injured at work, the situation becomes a little more complex. The issue of a child's entitlement to compensation for injuries suffered by the parent does arise when the parent has received worker's compensation benefits and has brought a tort action against a third party under [Wis. Stat.](#) § 102.29. In such an instance, the injured parent may have an incentive to cause a claim to be brought in the child's name so that some of the settlement proceeds can be paid to the child, thus bypassing the otherwise inflexible worker's compensation reimbursement provisions of [Wis. Stat.](#) § 102.29.

If a guardian ad litem recognizes such motivation on the part of a parent, some care must be taken. There is nothing wrong or illegal about negotiating a settlement in good faith to include a payment to a minor. Indeed, the distribution is often agreed upon by the injured parent, the worker's compensation insurer, and the third party before the guardian ad litem is ever involved. The guardian ad litem should take care, however, to ensure that the proceeds of the minor's portion of the third-party claim are treated appropriately. Some parents may initially be attracted to what really amounts to an excessive diversion of settlement funds to the minor because such a diversion reduces the amount of reimbursement payable to the worker's compensation provider under [Wis. Stat.](#) § 102.29. Only later may the parents fully realize that the funds were really paid because of the parents' own injuries. Once funds have been allocated to the minor's derivative claim and the court has approved the distribution, those funds should be no more available for the parent's use than if they were paid to resolve a direct claim for injuries suffered by the minor. The portion of the total settlement funds attributed to the minor's claim should accurately reflect the minor's damages, and then the guardian ad litem can avoid future disagreements by having the injured parent acknowledge the finality of the distribution in the paperwork or proceedings by which the court's approval is sought.

C. Injury to Minor's Child [§ 10.25]

Minors can be parents themselves. If a minor's child is injured, two minors own claims. The parent will undoubtedly become an adult long before the injured child's statute of limitation approaches. Therefore, in the absence of some disability to the parent other than minority, it is likely that resolution of the claim should be delayed. As with any claim involving injuries to a minor, the guardian ad litem and the court must candidly assess the true long-term best interests of the child or children involved. Usually, waiting for a complete assessment of the injury will be advisable. The minor parent will likely become an adult in the interim, and the difficult issues of how to address claims of a minor whose parent is a minor can be avoided.

Comment. Unfortunately, many minor parents have limited financial resources and may see their claim or that of their child as a solution to short-term economic problems.

VII. Payment of the Guardian ad Litem [§ 10.26]

When an insurer has reached a settlement agreement with the parent of a minor who is unrepresented, and the insurer seeks the services of a guardian ad litem to have the settlement approved by a court (thereby making the settlement binding on the minor), it is customary for the insurer to pay the guardian ad litem fees. In such an instance, a prospective guardian ad litem is well advised to make complete disclosure of this payment arrangement to the parent. Parents are often distrustful of insurers and quite wary of the legal system itself. They may perceive the traditional payment arrangement as an indication that the guardian ad litem is working for the insurer and is not genuinely motivated by the minor's best interests.

The alternative, of course, is for the guardian ad litem fees to come from the settlement proceeds. Depending on the settlement amount and the time required for the guardian ad litem to evaluate the settlement, this alternative may be distasteful to a parent who considered hiring an attorney to represent the minor and decided against it to avoid the expected expense and delay. From the parent's perspective, fees for representation—whether by an attorney or a guardian ad litem—may be exactly what the parent had hoped to avoid.

There is no perfect resolution of this issue. The parent's concern may be minimized if the insurer allows the parent or the court to choose the guardian ad litem, with the understanding that the insurer will pay the fees. The insurer can assist by making clear at the outset that the settlement, if approved, will call for payment of the agreed-upon amount plus guardian ad litem fees, whatever they turn out to be.

Whether paid by the insurer or out of the settlement proceeds, the guardian ad litem must be prepared to resist any pressure to minimize the time taken to fully analyze and appreciate the status of the case and the proposed settlement. Unfortunately, some courts will rely entirely on the guardian ad litem's recommendation. In such instances, the integrity of the court approval process depends on the work of the guardian ad litem. That work should not be minimized by the desire of an insurer or a parent to hold down the fees.

In cases in which the attorney appearing as guardian ad litem was retained at the outset to handle the minor's claim, the guardian ad litem fee issue is avoided. In most personal-injury cases, the attorney will have been retained on a contingent-fee basis and will not seek additional fees for acting as guardian ad litem. This is consistent with [Wis. Stat. § 757.48\(1\)\(b\)](#). In such instances, however, the court will appropriately expect full disclosure of the fees and will expect that the attorney will be willing to candidly discuss the fee arrangement.

VIII.

Forms [§ 10.27]

A. In General [§ 10.28]

Parties and court officials in all civil actions and proceedings in circuit court must use any applicable standard court forms adopted by the Wisconsin Judicial Conference. *See, e.g., Wis. Stat. § 807.001*. Mandatory forms adopted by the Judicial Conference are available from all clerk of court's offices and are also listed on and downloadable from the Wisconsin Court System's website: <https://www.wicourts.gov/forms1/circuit/index.htm>. If the Judicial Conference does not create a standard court form for a particular action or pleading, a format consistent with any statutory or court requirements may be used. [Wis. Stat. § 807.001\(4\)](#).

Users of the forms in this chapter should verify that the forms have not been superseded by standard court forms. For further information, contact the Records Management Committee (RMC), which advises the Director of State Courts Office and is responsible for developing the standard court forms.

For information on electronic filing of forms, see [Wis. Stat. § 801.18](#) and Wis. Ct. Sys., *Circuit Court eFiling, Electronic Filing in Wisconsin Courts*, <https://www.wicourts.gov/ecourts/efilecircuit/index.jsp> (last updated Apr. 29, 2024).

The nonmandatory forms in this chapter are samples only. *Always* check original sources of authority for current law and adapt the sample form language to fit your client's circumstances.

B. Petition for Order Appointing Guardian ad Litem and Consent to Act for Minor Under Age 14 (ELD-0048) [§ 10.29]

STATE OF WISCONSIN	CIRCUIT COURT	_____ COUNTY
BRANCH _____		
(Plaintiff's name) _____		
Plaintiff		
(Defendant's name) _____		Case No. _____
Defendant		
PETITION FOR ORDER APPOINTING GUARDIAN AD LITEM AND CONSENT TO ACT FOR MINOR UNDER AGE 14		

(Parent's name), parent of (minor's name), whose date of birth is (birthdate), requests that the court appoint Attorney (proposed guardian ad litem's name) of the law firm of (law firm name), as guardian ad litem for (minor's name).

Dated: _____

(Parent's name)

Signed and sworn to before me
on _____ (date)
Notary Public, State of Wisconsin
My commission _____

☐ This notarial act involved the use of communication technology.

C. Petition for Order Appointing Guardian ad Litem and Consent to Act for Minor over Age 14 (ELD-0049) [§ 10.30]

STATE OF WISCONSIN	CIRCUIT COURT	_____ COUNTY
BRANCH _____		
(Plaintiff's name) _____		
Plaintiff		

(Defendant's name)

Case No. _____

Defendant

**PETITION FOR ORDER APPOINTING
GUARDIAN AD LITEM AND CONSENT TO ACT
FOR MINOR OVER AGE 14**

(Parent's name), parent of (minor's name), and (minor's name) whose date of birth is (birthdate), and who is a minor 14 years of age or older, request that the court appoint Attorney (proposed guardian ad litem's name) of the law firm of (law firm name), as guardian ad litem for (minor's name).

Dated: _____

(Parent's name)

Signed and sworn to before me
on _____ (date)
Notary Public, State of Wisconsin
My commission _____

(Minor's name)

Signed and sworn to before me
on _____ (date)
Notary Public, State of Wisconsin
My commission _____

☐ This notarial act involved the use of communication technology.

D. Sample Petition for Approval of Settlement of Minor's Claim (ELD-0050) [§ 10.31]

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY
BRANCH _____

(Plaintiff's name)

Plaintiff

(Defendant's name)

Case No. _____

Defendant

PETITION FOR APPROVAL OF
SETTLEMENT OF MINOR'S CLAIM

Minor, by her guardian ad litem, (*guardian ad litem's name*), hereby petitions the Court pursuant to [Wis. Stat. § 807.10](#), for an Order approving a settlement of Minor's claims as set forth below:

1. Minor was born on February 10, 2017, and is the daughter of Parent. On August 15, 2022, Minor was a passenger in a 2020 Chevy Blazer operated by Parent, which was involved in a collision with a 2019 Honda operated by Driver. A copy of the police report describing the accident is attached as Exhibit 1.
2. As a result of the collision described above, Minor suffered multiple facial lacerations. She has undergone multiple surgeries and may require further surgical procedures in the future.
3. Attached as Exhibit 2 is a copy of the ABC Hospital Emergency Room record concerning Minor's treatment on the day of the accident.
4. Attached as Exhibit 3 is a copy of the XYZ Hospital Emergency Room record concerning Minor's treatment on the day of the accident.
5. Attached as Exhibit 4 is a copy of the Discharge Summary concerning Minor's hospitalization at XYZ Hospital following the accident.
6. Attached as Exhibit 5 is a copy of the Surgical Report concerning Minor's November 28, 2022 surgery at XYZ Hospital.
7. Attached as Exhibit 6 is a copy of the deposition of Doctor describing the care rendered to Minor following the accident. The deposition includes Doctor's description of the anticipated further treatment that will be necessary for Minor.
8. Attached as Exhibit 7 are photocopies of Exhibit A to Doctor's deposition.
9. At the time of the accident described above, the Driver's vehicle was insured by Insurco with bodily injury liability limits of \$100,000 per person. Attached as Exhibit 8 is a copy of the Affidavit from Insurco's representative identifying the declaration sheet reflecting those policy limits.
10. At the time of the accident described above, the Parent's vehicle in which Minor was a passenger was insured by Indemco. The Indemco coverage included underinsured motorist coverage with policy limits of \$300,000.
11. Insurco has paid its policy limits in a partial settlement, which was approved by this Court pursuant to an Order dated March 26, 2024, a copy of which is attached as Exhibit 9.
12. A proposed settlement has been reached between Indemco and Minor, by her guardian ad litem, under which all Minor's claims will be resolved in exchange for an agreement that Indemco provide the following:
 - a. A payment in December 2024 in the amount of \$40,000.
 - b. A structured settlement with a present value of \$50,000 consisting of the following:
 - (1) Monthly payments beginning in February 2035 in the amount of \$250 and continuing for 30 months;
 - (2) Monthly payments beginning in August 2035 in the amount of \$625 and continuing for 60 months;
 - (3) A single payment in August 2037 of approximately \$25,000.

13. Minor, by her mother, retained Lawfirm on a one-third contingent-fee basis to pursue claims on her behalf arising out of the accident. Lawfirm has agreed to reduce its claim for fees to one-fourth.
14. Parent is employed by Employer. She and Minor are covered by the Employer Employee Benefit Plan ("the Plan"), which is a party to this case because it has paid a portion of the cost of Minor's health care since the accident and claims a right to be reimbursed because of a "lien and order directing reimbursement of group health plan" executed by the Plan, a copy of which is attached as Exhibit 10. The Answer to the Amended Complaint and Counterclaim, which has been filed by the Plan, sets forth its claims. A copy of that pleading is attached as Exhibit 11.
15. Attached as Exhibit 12 is a copy of the page of the Plan documents that describes the circumstances under which the Plan has a claim for reimbursement. As in the "lien and order" attached as Exhibit 10, the language of the Plan itself limits the Plan's reimbursement rights to situations in which a third party is responsible or agrees to compensate the person signing the reimbursement agreement for an illness or injury suffered by that person or that person's dependent.
16. The proposed distribution of the initial \$40,000 payment referred to above being made in December 2024 is as follows:
 - a. To Lawfirm as attorney fees, \$22,500;
 - b. To Minor pursuant to [Wis. Stat.](#) § 54.12(1), \$17,500.
17. There remains in trust, as a result of the initial settlement previously approved by the Court, the sum of \$13,338.61.
18. It is anticipated that upon approval of the settlement of Minor's claims, the claims of Minor will be the subject of a stipulation for dismissal with prejudice and without costs, such that this matter in its entirety will be dismissed.

THEREFORE, the Petitioner requests that the Court enter an Order accomplishing the following:

- A. Finding the proposed settlement with Indemco to be reasonable and approving it;
- B. Approving the distribution of the settlement proceeds as proposed;
- C. Determining that none of the settlement proceeds should be paid to the Employer Employee Benefit Plan;
- D. Authorizing the guardian ad litem to execute appropriate releases on behalf of Minor; and
- E. Directing that the funds held in trust pursuant to the previous Order of the Court continue to be held in trust until Minor's 18th birthday, but modifying that Order such that the funds may be used between now and Minor's 18th birthday for medical expenses or other expenses deemed by the guardian ad litem to be in the best interests of Minor.
- F. Dismissing this case with prejudice and without cost to any party.

Dated: _____

[Type "Electronically signed by"
and your name on this line]

Guardian ad Litem
State Bar No. _____

(Guardian ad litem's address)
(Guardian ad litem's telephone no.)
(Guardian ad litem's email address)

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* For proceedings involving minors under age 14, Form [GF-131A](#) should be used as the standard form Order Appointing Guardian ad Litem or Attorney and Form [GF-131B](#) should be used as the standard form Consent to Act.

* See [Wis. Stat.](#) § 803.01(3)(b)2. (providing that, if plaintiff is minor 14 years old or older, plaintiff must make own application for appointment of guardian ad litem).

NOTE: For proceedings involving minors who are 14 years old or older, Form [GF-131A](#) should be used as the standard form Order Appointing Guardian ad Litem or Attorney and Form [GF-131B](#) should be used as the standard form Consent to Act.